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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 636 43

N. L. LINER, ET AL., PETITIONERS,

vs.

JAFCO, INC., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF TENNESSEE

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1962
CERTIORARI GRANTED JANUARY 14, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 628

N. L. LINER, ET AL., PETITIONERS,

vs.

JAFCO, INC., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF TENNESSEE

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[fol. 13] [File endorsement omitted]

IN THE CHANCERY COURT, BRADLEY COUNTY, CLEVELAND, TENNESSEE

To the Honorable Glenn W. Woodlee, Chancellor, Holding the Chancery Court at Cleveland, Bradley County, Tennessee.

JAFCO, INC., a Tennessee Corporation having its principal office and place of business in Cleveland, Bradley County, Tennessee, and REA CONSTRUCTION COMPANY, a Corporation authorized to do business in the State of Tennessee and County of Bradley, Complainants,

VS.

N. L. LINER, a citizen and resident of Bradley County, Tennessee; LOCAL 846 of the HOD-CARRIERS BUILDING & COMMON LABORERS UNION OF AMERICA, an unincorporated association or labor organization having its principal office at 540 Vine Street in the City of Chattanooga, Hamilton County, Tennessee;

HOD-CARRIERS BUILDING & COMMON LABORERS UNION OF AMERICA, an international union or unincorporated association or trade union which is a non-resident of Tennessee, but is subject to service of process through the Secretary of State of Tennessee because it does business in Tennessee through its Locals; and ALL OTHER STRIKERS, PICKETS AND SYMPATHIZERS, Defendants.

AMENDED AND SUPPLEMENTAL BILL—Filed August 10, 1960

Complainants file this amended and supplemental bill in this cause and respectfully show unto the Court the following facts:

I.

The facts set out in the caption to this bill are true and all the parties are subject to the jurisdiction of this Court.

II.

Complainant, Jafco, Inc., a corporation, is engaged in building a shopping center within the City of Cleveland, Bradley County, Tennessee, said shopping center to cost in the neighborhood of $2,000,000.00. The Complainant, [fol. 14] Rea Construction Company, also a corporation, is the general building contractor in charge of and conducting said construction.

III.

That in connection with the building of said shopping center, the complainant, Jafco, Inc., has entered into a written contract with the complainant, Rea Construction Company. Said contract is here to the Court shown and will be produced on or before the hearing of this cause, and provides, among other things, that all work will be completed by August 1, 1961; and time is of the essence in so far as the completion of the contract is concerned.

Complainant, Rea Construction Company, is also obligated to substantially complete the work by June, 1961, so that tenants may be able to begin moving in their fixtures and equipment. Should said complainant be unable to finish the work as agreed and as a result one or more tenants of the complainant, Jafco, Inc., should cancel under the terms of their respective agreements which all include specific completion dates on penalty of forfeiture, the complainant, Rea Construction Company, would be subject to large and substantial claims for damages sustained by said Jafco, Inc. and would suffer great and irreparable damage if prevented from performing its contract in time by the unlawful and illegal acts of the defendants herein complained of.

Also, the complainant, Jafco, Inc., would be subject to cancellation by one or more of its tenants in case the work is not completed by the date or dates set out in its lease contracts, the latest of which dates is September 1, 1961, and since all tenancy contracts by their terms are subject to cancellation if other specified tenants cancel as a result [fol. 15] of delays in construction by the defendants and their agents, if not restrained by this Honorable Court the unlawful acts of defendants could and would result in the loss of tenants vital to the operation of the shopping center

and thereby cause the complainant, Jafco, Inc., great and irreparable loss and damage.

IV.

That also incidental to the building of said shopping center, complainant, Jafco, Inc., has entered into a separate agreement with Lonas Construction Company, Inc., formerly known as Oslo Construction Company, Inc., for the grading of the building site of said shopping center.

The prompt completion of the grading being done by Lonas Construction Company, Inc., is urgently necessary in order that the general contractor, Rea Construction Company, can efficiently and without interruption proceed with its construction; and the unlawful and uncalled for action of the defendants complained of herein, unless restrained by this Honorable Court, will thereby also cause both complainants great and irreparable damage and loss.

V.

It is further true that under the terms of a written agreement between the complainants, the complainant and general contractor, Rea Construction Company, is to receive a fixed fee for its services, but with the further provision that it shall share to the extent of twenty-five per cent (25%) in all savings which may be effected by economy of operation and construction; and the unlawful acts of the defendants, unless restrained by this Honorable Court, can and will result in great and unexpected costs of con-
[fol. 16] struction and thereby result in great and irreparable losses to both complainants.

It is further provided by the terms of the written agreement between the complainants that the complainant, Jafco, Inc., shall reimburse the complainant, Rea Construction Company, for all costs necessarily incurred in the proper execution of the work, including labor, salaries for employees, losses and expenses, payments to sub-contractors, and many other items, the amount of which will be greatly and unjustly increased by the unlawful acts of the defendants unless restrained by the orders of this Honorable Court.

VI.

That work was begun by the said contractors heretofore, each of them having men working on the project, and each of the said contractors has heavy equipment on the site and was actually engaged in the performance of the work until the work was stopped by the illegal activity of defendants complained of.

VII.

That there is no labor dispute of any kind or character between the said contractors and their workers or between the said contractors and any union.

VIII.

That despite the absence or lack of any labor dispute, and the utter absence or lack of any demand by any labor organization of the complainants or either of the aforesaid contractors, on Monday, August 8, 1960, the defendant N. L. Liner appeared on the scene of the construction bearing a picket sign which reads as follows:

> [fol. 17] "Rea Construction company not under contract with Chattanooga Building Trades Council, AFL".

IX.

That as a result of said picket being on the scene, the work on the project has been utterly paralyzed because a small number of the employees of one or both of said contractors belong to a union or unions, and complainants are advised that these employees are fearful of working while the said picket is there for fear of reprisal at the hands of the defendant unions or some other union. Complainants further aver that these heavy earth moving machines and equipment which are being used on this project require the services of highly skilled and trained technicians, and many of said technicians belong to the union because of the difficulty of obtaining employment in certain areas unless they have union membership. They can not be replaced with non-members of unions without great delay in construction and expense to complainants.

X.

Complainants aver that the purpose and or the effect of the aforesaid picketing, which complainants allege and charge is being done at the instance of the defendant, Local 846 of the Hod-Carriers Building & Common Laborers Union of America, is to force the breach of the existing contracts between the complainants on the one hand or the complainant Jafco, Inc., and Lonas Construction Company on the other; and complainants aver that said picketing is therefore unlawful under TCA Section 47-1706 which reads as follows:

> "It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party [fol. 18] thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of said contract; and the party injured by such breach may bring his suit for said breach and for such damages."

XI.

Complainants further charge that they are the innocent victims of this illegal action on the part of the defendants, and that said illegal action appears to arise from a conspiracy on the part of the defendants through their officers, agents and members; and that the complainants are threatened with irreparable injury unless the aid of this Honorable Court is afforded to terminate the picketing and the interference by the defendants with complainants' project.

XII.

Complainants would further point out that under complainant Jafco's contract with its lending agency and with its prospective tenants and with all others connected with said project, the time deadlines set out above must be met; and if the same are not met, it will result in the utter ruining

and destruction of complainants' rights under said contracts and agreements. It is therefore of the utmost urgency and necessity that complainants be permitted to proceed with the work during the summer while the weather conditions are such as to permit the completion of work on schedule.

The contract between complainants, is of such nature that the complainant, Rea Construction Company, has incurred considerable financial risk; and if its calculations as to weather and other elements affecting such contracts should be invalidated by the illegal acts of the defendants complained of said complainant will of necessity suffer great and irreparable damage.

[fol. 19] XIII.

Complainants further aver that it is illegal under TCA Sections 50-208 and 50-209 for an employer in Tennessee to discriminate as between union workers and non-union workers.

Said Sections are as follows:

"50-208. It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

"50-209. It shall be unlawful for any person, firm, corporation or association of any kind to enter into any contract, combination or agreement, written or oral, providing for exclusion from employment of any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

XIV.

If the purpose of the defendants is to force the employment of members of the Chattanooga Building Trades Council then their action is illegal under the aforesaid Code Sections, and if it be their intent by their picketing activity to prevent persons not having union membership from

working on complainants' job and thereby bring about a union shop in the entire building project, then their conduct is also for that reason a violation of the laws above quoted.

XV.

Complainants further charge that if the defendants' action is merely to advertise the fact that the Rea Construction Company is not under contract with the Chattanooga Building Trades Council, then the action of the defendants constitutes a malicious, deliberate and unwarranted effort to damage and injure the complainants, in whose activities [fol. 20] they have absolutely no interest whatever, since it is of no public interest to anyone as to whether the Rea Construction Company is under contract with said defendants; and since there are approximately 160,000,000 to 170,000,000 other persons, firms or other organizations in the United States to which the said defendants are not under contract. And complainants charge that the publication of what may even be regarded as a truth constitutes an actionable cause when it is done wickedly, maliciously and for no purpose other than to hurt and defame and damage and destroy, or when it results in damage to the rights or property of others.

The defendants are not employees and have no contractual relationship with complainants, but by so-called peaceful picketing are trying without just cause or excuse to injure or destroy the business of complainants, who are attempting to exercise the right to conduct lawful business as guaranteed by the provisions of the Constitutions of the State of Tennessee and the United States of America. Their conduct amounts to a nuisance as well as an invasion of complainants' property rights, and will result in irreparable injury and damage to complainants unless restrained by force of law.

Premises Considered, Complainants Pray:

1. That process issue and be served on the defendant Liner and that counter process be sent to Hamilton County, Tenn. for service on the defendant, Local Union and the defendant Building Trades Council, and that process be

served on the defendant International Union through the Secretary of State, as provided by law, and that the defendants be required to appear and answer this bill, but their oaths to their answers are waived.

[fol. 21] 2. That this Honorable Court issue the temporary injunction prayed in the original bill enjoining and restraining the defendants and all their pickets, strikers and sympathizers from picketing and aforesaid job or in any other manner interfering with the performance of the said job, and that at the hearing this injunction be made perpetual.

3. That complainants be awarded damages against the defendants because of the defendants' illegal actions as hereinbefore stated, and that included in said damages complainants be awarded their reasonable counsel fees and expenses because of said unwarranted actions on the part of defendants.

4. That complainants have such other and further relief as in equity they may be entitled to receive.

The Application for an Injunction in the Original Bill Is the First Application for an Injunction in This Cause.

Jac Chambliss, James F. Corn, Solicitors for Complainants.

We are surety for all costs adjudged against complainants in this cause.

James F. Corn Jr., C. Louis Patten, James F. Corn.

Duly sworn to by James F. Corn, Jr., jurat omitted in printing.

[fol. 27]

No. 6377

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

[Title omitted]

LETTER OF SEPTEMBER 2, 1960 RE MOTION THAT INJUNCTION BE DISSOLVED

Mr. Jac Chambliss
Solicitor for Complainants

At 10 A.M. on the 10th day of September, 1960, before the Honorable H. J. Garrett, Chancellor, in the Court House at Manchester, Tennessee, I will move that the injunction in said cause be dissolved or modified and the bill dismissed, which motion will be based on the want of equity on the face of the bill, and/or bill and answer, and want of jurisdiction of this Court over the subject matter.

This 2nd day of September, 1960.

S. Del Fuston, Solicitor for Answering Defendants.

Certificate of Service, September 2, 1960. By S. Del Fuston.

[fol. 28] [File endorsement omitted]

No. 6377

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

[Title omitted]

MOTION TO DISSOLVE INJUNCTION AND DISMISS BILL — Filed September 3, 1960

Come defendants, by their solicitors, and move the Court to dissolve the injunction heretofore granted in this cause and to dismiss the bill on the following grounds, to-wit:

1. There is no equity on the face of the bill of complainant.

2. On Bill and Answer.

3. This Court is without jurisdiction to grant an injunction against peaceful picketing because:

(a) It constitutes an encroachment upon the exclusive jurisdiction of the National Labor Relations Board over the subject matter.

(b) The injunction against peaceful picketing violates defendants' right of freedom of speech as guaranteed by the constitutions of the United States and of the State of Tennessee.

S. Del Fuston, for King & Fuston, Solicitors for Chattanooga Bldg. Trades.

Certificate of Service. This 2nd day of Sept. 1960. By: S. Del Fuston.

[fol. 29] [File endorsement omitted]

No. 6377

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

[Title omitted]

ANSWER—Filed September 3, 1960

Come the defendants, with the exception of Hod Carriers, Building and Local 846 thereof, and Common Laborers Union of America, an International Union, in the capacities in which they are sued, and for answer to so much and such parts of the bill as they are advised is relevant, material and necessary to answer say:

The Original bill has been superseded by an amended and supplemental bill, the amended and supplemental bill contains all of the allegations of the original bill and in

addition thereto other allegations, therefore each of the above defendants answering individually, for their joint, separate and several answers to the amended and supplemental bill say:

I.

The allegations contained Paragraph I of the Amended and Supplemental bill are denied. The Parties may be subject to the jurisdiction of the Court, but the Court does not have jurisdiction of the subject matter as will be shown hereinafter.

II.

It is admitted that the complainant, Jafco, Inc., is a corporation engaged in the building of a vast shopping center in Cleveland, Tennessee, to cost in the neighborhood of $2,000,000.00. It is also admitted that Rea Construction Company is the general building contractor and in charge [fol. 30] of construction. These defendants would show to the Court that due to the size and magnitude of the project that both complainants are engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended.

III.

It is admitted, on information and belief, that the complainant, Jafco, Inc., has entered into a written contract with complainant, Rea Construction Company. These defendants have not been advised of the terms of the contract but allege that said provisions will speak for themselves.

It is assumed that said contract has the normal and customary provision that relieves the parties of the time element in the event of labor difficulty.

It is denied that the parties would suffer irreparable damage or be subject to a cancellation of the contract in the event the contract is not performed by a certain time.

The allegations in regard to Jafco, Inc., having to cancel contracts is not performed by a certain time.

The allegations in regard to Jafco, Inc., having to cancel contracts with its tenants is denied and strict proof demanded. In the event that any of the complainants suffer

any damages the same is incidental and damages for which no action lies.

IV.

On information and belief, it is probably true that complainant, Jafco, Inc., has entered into separate contracts with various subcontractors. It is denied that complainants will suffer great and irreparable damage and loss in the [fol. 31] event there are normal and lawful interruptions caused by legitimate and protected labor advertising.

V.

All of the allegations contained Paragraph V are denied, in the event same become material.

VI.

It is admitted that work has begun on said project but it is denied that any work was stopped by the activities of defendants. It is specifically denied that there has been any illegal activity on the part of any of the defendants.

VII.

It is admitted that the defendants, N. L. Liner, appeared on the scene of construction bearing a picket sign which truthfully stated that Rea Construction was not under contract with Chattanooga Building Trades Council, AFL. Complainants tacitly admit the truth of the banner. It is denied that the defendant, N. L. Liner, was the agent or acted in any capacity for the defendant, Local 846 of Hod Carriers International Union.

Defendants would show that the Chattanooga Building Trades Council embraces several counties in Tennessee, one of which is Bradley County and customarily work on projects in that County, as well as in Hamilton County, and other counties in the vicinity. All other allegations of Paragraph VIII are denied and strict proof demanded.

IX.

The allegations contained in Paragraph IX are denied and strict proof demanded.

[fol. 32]

X.

All allegations contained in Paragraph X are denied and strict proof demanded. These defendants would show to the Court that the Tennessee Common Law and Tennessee Statutory Law does not apply to interstate commerce where the National Labor Relations Board has jurisdiction.

XI.

The allegations contained in Paragraph XI are denied and strict proof demanded.

XII.

The allegations of Paragraph XII are denied and strict proof demanded.

It is alleged that the said contracts are not material in those cases involving interstate commerce where the National Labor Relations Board has full and complete jurisdiction. In the event that the contracts referred to become material, these defendants again allege that complainants could and should have protected themselves by the customary labor provision in their contracts.

XIII.

These defendants admit that Sections 50-208 and 50-209 of the Tennessee Code Annotated are correctly quoted. These defendants would show however, that said sections have no application to a cause of action effecting interstate commerce which is subject to the National Labor Relations Act. In the event said sections become material the innuendo that these defendants might be violating said sections is denied and strict proof demanded.

* * * * * * *

[fol. 33]

XIV.

The Allegations of Paragraph XIV are denied and strict proof demanded. Again, these defendants would show to the Court that interstate commerce is involved and that the allegations contained in said paragraph are immaterial

where the National Labor Relations Board has full and complete jurisdiction.

XV.

The allegations contained in Paragraph XV are denied and strict proof demanded.

These defendants would show to the Court that the purpose of the picketing is to inform members of organized labor in Cleveland and vicinity, sympathizers of the Labor Movement, and the public in general, that the complainants' project is not under contract with appropriate bargaining labor organizations. The effect that is sought is that persons who hire contractors hereafter will know which are union contractors and which are not. If those people desire to hire such contractors as complainants they are so informed. It is the hope of organized labor that the public, one informed will hire contractors who agree to contracts protecting the employee as to wage, hours and working conditions. Without such publicity there would be no effective way of informing the public in that vicinity.

Allegations contained in the last paragraph immediately prior to the prayer for relief is denied. In the event that the allegations regarding the loss of money, damages, loss of contracts, invasion of property rights and such, become material it is alleged that they are damnum absque injuria.

XVI.

All allegations of the original bill, as amended by the amended and supplemental bill, not heretofore denied, explained or admitted are here and now denied as though specifically denied.

[fol. 34] XVII.

And now for further answer and defense, these defendants aver that the allegations of the original bill as amended charge nothing other than peaceful picketing with a banner which speaks the truth. The alleged purposes are conclusions, and are matters for the National Labor Relations Board.

The general overall purpose of complainants' bill is to aver the purposes and policies of the National Labor Rela-

tions Act as amended by preventing peaceful picketing. The conduct of the picketing is either protected conduct or unlawful conduct within the meaning of the National Labor Relations Act as amended. In either event the National Labor Relations Board has sole and exclusive jurisdiction of the subject matter.

Therefore, this Court is without power or authority to decide the issues in this cause, and any judgment rendered by this Court other than an order of dismissal, would be null and void.

XVIII.

For further defense, these defendants allege that the Court is without jurisdiction to restrain peaceful picketing for the reason that the granting of such injunction would be to deprive these defendants of the right of free speech guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and the rights guaranteed by the Constitution of the State of Tennessee.

And now having fully answered these defendants pray to be dismissed with their reasonable costs.

S. Del Fuston, for King and Fuston.

[fol. 35] *Duly sworn to by C. Earle Williams, jurat omitted in printing.*

[fol. 38] [File endorsement omitted]

No. 6377

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

[Title omitted]

MEMO—September 29, 1960.

This matter is before the Court on a motion to dissolve, on bill and answer, the temporary injunction heretofore issued in the case.

The Complainant, Jafco, Inc., is engaged in building a shopping center in the center of Cleveland, Bradley County, Tennessee. The cost of said shopping center is approximately $2,000,000. The Complainant Rea Construction Company is the general building contractor in charge of and carrying out said construction. The completion date of the contract of construction is August 1, 1961. Sub-contractors of the Rea Construction Company are engaged in moving dirt on the building site. On Monday, August 8, 1960 the defendant N. L. Liner appeared at the scene of the construction with a picket sign and began to picket said site. The picket sign charged as follows: "Rea Construction Company not under contract with Chattanooga Building Trades Council, A.F.L." Soon after the picket was on the scene the work on the project completely stopped because the workers refused to work while the picket was there. The original bill in this cause was filed on August 9, 1960 and fiat for injunction issued on application of the petitioners before the filing of the bill on August 8, 1961. With the restraint of the pickets the construction continued. It is apparent from the pleading that there is no labor dispute in existence between complainants and the defendant, and [fol. 39] the defendants are not seeking a contract with the complainant.

It is the theory and insistence of the complainants that the existence of labor dispute is a prerequisite for obtaining jurisdiction of the National Labor Relations Board and that since it is not a labor dispute that that board is without jurisdiction to intervene. Various authority is cited by complainants to show that the state courts have jurisdiction. Authority is also cited by the complainants, Gibson's Suits in Chancery; Section 898, prohibiting the dissolution of an injunction where the dissolution of the injunction would be tantamount to a decision on the merits or where the injunction is the real remedial part of the bill. The insistence is also made that the question of the jurisdiction of this court should properly be raised by a plea in abatement or demurrer. The record shows that a demurrer was filed on the 12th day of September, 1960. Further complainants contend that the action of the defendants is contrary to the statutory law of this state described as the Tennessee anti-

closed shop and that the effect of the picketing is to stop work on the project and thereby cause a breach of contract which is prohibited by the Tennessee Statute prohibiting third party interference in tracts.

It is the insistence of the defendants, on the other hand, that there is no complaint of violence or mass picketing, that its sole purpose is to advertise and let the public know in the vicinity of the construction that the Rea Construction Company is not under union contract and that they have a right to so advertise in this manner. And further that the state courts have no jurisdiction and that the conduct of the defendants is protected under the National Labor [fol. 40] Relations Act. It is also argued in behalf of defendants that due to the size of this operation that the contractors are engaged in interstate commerce. They also deny that the actions of the defendant in any way violate the so-called right to work law of this state or any other law. And it is further argued that if an injunction of this nature is allowed to stay in effect the union has no practical way of reaching the public to advertise the truth, and that it in effect destroys their right to picket.

I think it is patently obvious in this case that the injunction relief sought is in fact the remedial part of the bill and its dissolution would be the equivalent of a decision on the merits. It is further the view of the court that there is no bona fide labor dispute between the parties in this litigation and that the existence of a labor dispute is a prerequisite, along with the involvement of interstate commerce, for the National Labor Relations Board before obtaining jurisdiction. I think it is clear from these facts that the National Labor Relations Board has not preempted the state courts' rights in a case resting on the foregoing facts, under the Aladding Industries case, 23 S.W. (2d) 322, and in the case of Newport Industries v. Lake Charles Metal Trades Council, U. S. District Court for the Western District of Louisiana, 17, Labor Cases 65, 284.

In view of the foregoing I feel that I must overrule the motion to dissolve the injunction. The demurrers filed Sep-

tember 12th are also overruled but the defendant is allowed to rely upon the same in his answer and the case is remanded to the rules for proof.

So Order:

This the 29th day of September, 1960.

H. J. Garrett, Chancellor.

[fol. 41] [File endorsement omitted]

No. 6377

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

[Title omitted]

ORDER OVERRULING THE MOTION TO DISSOLVE THE INJUNCTION, ETC.—March 10, 1961

This cause came on to be heard before the Court on a motion to dissolve, on bill and answer, the temporary injunction heretofore issued in the case, and after hearing argument of said motion and studying the briefs filed in connection therewith, the Court is of the opinion that said motion is not well taken for the following reasons:

1. It is obvious that the injunctive relief sought is in fact a remedial part of the bill, and its dissolution would be the equivalent of a decision of the case on its merits, and such is forbidden by the Chancery practice of this state.

2. There is no bona fide labor dispute between the parties in this litigation and therefore the state court has jurisdiction of the matter and the same has not preempted by the National Labor Relations Board.

The motion to dissolve the injunction is accordingly overruled and disallowed.

It is further the Order of the Court that the demurrers filed on September 12, and submitted to the Court simultaneously with the motion to dissolve are also overruled, but the defendant is allowed to rely upon the same in his answer.

It is further ordered that the case be and the same hereby is remanded to the rules for the taking of proof.

H. J. Garrett, Chancellor.

O.K.
Jac Chambliss For Complainants

[fol. 42a]

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

No. 6377

JAFCO, INC., et al., Complainants,

vs.

N. L. LINER, et al., Defendants.

Transcript of Testimony—February 22, 1961

APPEARANCES:

James F. Corn, Esq., and Jac Chambliss, Esq., of Chambliss, Chambliss & Brown, Solicitors for Complainants.

Del Fuston, Esq., of King & Fuston, Solicitors for Defendants.

• • • • • • •

[fol. 74] Deposition of FRITZ DIEHL, the next witness, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Corn:

Q. You are Mr. Fritz Diehl, I believe?

A. That is correct.

Q. How old are you, Mr. Diehl?

A. I will be thirty-seven the 22nd day of May.

Q. What is your occupation?

A. I am a graduate engineer and superintendent of construction.

Q. Who do you work for now?

A. I work for the Rea Construction Company.

Q. Are you in charge of the construction job of what is known as The Village Shopping Center at Cleveland, Tennessee?

[fol. 75] A. Yes, sir, I am.

Q. Have you been in general charge of that since the beginning of the work?

A. Since August 1st.

Q. Where is your home, your permanent home?

A. I was born and raised in Pennsylvania.

Q. You still claim Pennsylvania as your home?

A. Educated at the University of Cincinnati.

Q. Do you claim Pennsylvania as your permanent home?

A. Yes, sir.

Q. Mr. Diehl, in the construction of The Village at Cleveland, Tennessee, what is the source of your labor supply?

A. We are trying as much as possible to use the available local labor to bolster the local economy all we possibly can.

Q. What labor do you have that is not local?

A. Generally speaking, the only labor that is not local is the supervisory labor such as myself and the subforemen under me.

Q. Common labor, carpenters, brick masons, plumbers, work of that kind, where do you get that?

A. They are obtained locally, hired on the job.

Q. Could you state in terms of percentage with any accuracy what percentage of your labor is local labor?

A. Well, over 90 per cent.

Q. What about materials, Mr. Diehl, that go into this construction, where are the materials purchased?

A. Well, we are using and have used to date or practically all obtained locally, the concrete from a local concrete ready-mix company, our floor material with the ex- [fol. 76] ception of plywood has been bought from the Conasauga River Lumber and some is from Evans in Chattanooga, the exception I made is because there is no plywood made in this locality or to my knowledge, there is none made and if there is it is not competitive.

Q. Conasauga River Lumber Company in Polk County, Tennessee?

A. Yes, sir, I guess it is Polk County.

Q. It is an adjoining—

A. (Interposing) It is off of 411.

Q. It is an adjoining Tennessee county, it adjoins Bradley?

A. Yes, sir.

Q. On percentages, Mr. Diehl, up until this time, what percentage of materials that have gone into the job down there have been purchased in this general location in the State of Tennessee?

A. I would say over 75 per cent.

Q. That would include Chattanooga and Conasauga, Georgia, also?

A. That would include the State of Tennessee.

Q. Anything in the state?

A. Yes.

Q. At the time that the picket came down on the job where were you at the time?

A. I was on the job.

Q. What employees did you have there at the time, in other words, did you have Rea Construction Company employees at that time?

A. I was the only employee of Rea Construction Company at the time.

[fol. 77] Q. What other organizations were on the ground?

A. Lonas Construction Company and McKinney Drilling Company.

Q. Has Lonas Construction Company sometimes been known as the Oslo Construction Company, if you know?

A. Yes, they are.

Q. They are a Cleveland outfit?

A. They are a local outfit.

Q. Where is McKinney from?

A. They are from Atlanta and Nacadoches, Texas.

Q. Do you know who sent them here, whether Rea Construction or whether they were gotten by somebody else?

A. Their contract was finalized through efforts of Rea Construction Company.

Q. They come from Atlanta, I believe you say?

A. Yes, they have a branch office in Atlanta.

Q. At the time that this picket showed up, what was the stage of the construction, what was going on down there on the site?

A. The site grading and the foundation work which consisted of these drilled in place caissons which are holes drilled in the ground by a large drilling rig and the hole is subsequently then filled with concrete to form a pier for the buildings to rest on.

Q. At that time with regard to access to the place, where was the customary and usual place of access by vehicles, automobiles or heavy equipment and all that sort of thing?

A. Along the north boundary of the project which is known as First Street, I believe.

[fol. 78] Q. Is that sometime known as Harrison Pike?

A. Yes, I believe it is also known as Harrison Pike.

Q. Were there any other entrances to the job that were available for vehicles and heavy earthmoving equipment at that time?

A. Yes. The property owned by Cleveland Express had been crossed for that purpose but it was held to a minimum.

Q. I believe you say that your regular entrance point, was that near the Legion Home?

A. Near what was called the Legion Drive.

Q. And Legion Drive led actually into your property?

A. That's right.

Q. Into the Jafco property?

A. That's correct.

Q. And that was the customary access point at that time?

A. That's right.

Q. When the picket showed up down there, Mr. Diehl, where did he make his appearance?

A. At that location. He placed or walked, however you would want to say it, up and down Harrison Pike.

Q. That bounds the property on the north, I believe?

A. On the north boundary.

Q. What effect did his appearance have on the conduct of the work?

A. It stopped the work because the men that were on the job at that time were, to my information or from my information, affiliated with organized labor, that is, the McKinney Drilling Company's employees and Lonas Construction Company employees.

[fol. 79] Q. Does that apply to the men that were operating the heavy earthmoving machinery?

A. Yes, sir.

Q. Do you know whether or not their employer, the Oslo Construction Company, made any efforts toward getting the picket pulled off?

A. No, I don't know if they made any efforts to have the picket removed. They tried to find out what it was about, they had no knowledge that there was to be a picket there or why he was there.

Q. Did you have any knowledge of why the picket was there prior to the time he appeared?

A. Only what information was on his placard.

Q. Had any representative of any of the labor unions approached you with regard to this job before the picket showed up?

A. Not officially, no.

Q. Do I understand you that both organizations that were on the ground and the only organizations on the ground at the time the picket showed up were using union labor?

A. That is correct, the only two organizations that had any manual employees were using manual labor or union labor.

Mr. Corn: You may ask him, Mr. Fuston.

Cross examination.

By Mr. Fuston:

Q. Is your name spelled (spelling) D-i-l-l?

A. No. (Spelling) D-i-e-h-l.

Q. Oh, I'm sorry.

A. F. J. are the initials.

Q. And what part of Pennsylvania are you from, Mr. Diehl?

[fol. 80] A. My home is in Butler, Pennsylvania.

Q. Butler?

A. It is about thirty miles north of Pittsburgh.

Q. I believe it is on the road from Pittsburgh to Warren?

A. It is on the road between Pittsburgh and Franklin, Route 8 north of Pittsburgh.

Q. And you are a graduate of the University of Cincinnati?

A. That is correct.

Q. What kind of degree do you have from there, sir?

A. Civil engineer. That is differentiated from bachelor of science in civil engineering in that I had completed a course in co-op work.

Q. After you left the University of Cincinnati, where did you start working?

A. I, of course, in my co-op work I worked for the City of Cincinnati.

Q. I am talking about after you got your degree?

A. After I was graduated I went to work for Jones Tompkins.

Q. Jones who?

A. Tompkins.

Q. Where are they located?

A. It was a joint venture that was located at Old Hickory.

Q. Tennessee?

A. Old Hickory, Tennessee, right.

[fol. 81] Q. Is that the same Jones who has an interest in the Rea Construction Company?

A. To my knowledge, they have no interest.

Q. When did you go with the Rea Construction Company?
A. To my knowledge, they have no interest.
Q. When did you go with the Rea Construction Company?
A. This is my first job with Rea Construction Company.
Q. You never did work for them any place else?
A. No, sir.
Q. Who hired you for this particular job?
A. Mr. Raymond Jones.
Q. Mrs. Raymond Jones?
A. Yes.
Q. Is that the same Jones of Jones-Tompkins?
A. No, it is the Jones that is president of Rea Construction Company.
Q. Well, Jones of Jones-Tompkins, there is a relation between him and Raymond Jones, you know that to be fact, don't you?
A. No I don't know it to be a fact.
Q. You haven't heard of that?
A. I have heard that there are and is the same monies in the companies but they entirely two different companies.
Q. I see. Do you know how much The Village or Shopping Center, or whatever you refer to the project that you are on now is to cost, approximately?
A. In the neighborhood of two to two and half million dollars.
Q. That's exclusive of land, too, isn't it?
[fol. 82] A. Yes, sir.
Q. This work started on August 1st of 1960, correct?
A. No, that is not correct. Lonas Construction Company started its site work, I have been informed, back in December. That would be December of '60.
Q. Fifty-nine?
A. Fifty-nine.
Q. When did you start work here on the project?
A. August 1st.
Q. Of 1960?
A. That's right.
Q. I believe today is February 22?
A. Yes.
Q. Of 1961?
A. Sixty-one.

Q. How far along would say in terms of percentages, you have been giving percentage estimates, would you say that The Village is complete, half or quarter, three-quarters, 9 per cent, 10 per cent, or what, just the best of your ability as a graduate engineer?

A. I would say approximately half.

Q. Approximately half?

A. Yes, sir.

Q. Do you have anything to do with the payroll?

A. Yes, sir, I am required and it is my duty to authorize the payroll.

Q. What do you say, pay out each week as the laborers or the employees are to be paid, you pay each week or each two weeks, or what?

[fol. 83] A. We pay each week by week.

Q. How do you pay for materials?

A. On invoices, we pay on invoices.

Q. And you keep those current or do you lag behind in them?

A. We try to stay as prompt as possible for two reasons, for our company reputation and to obtain the cash discounts as they fall due.

Q. I understand. And having as much to do with the payroll as you have, you say the project is to cost from two to two and half million dollars, would you estimate that if you know, I'd rather have the exact figure, approximately how much has been out on it so far?

A. I can't quote from memory. It could be ascertained from our monthly estimate.

Q. What would be your best estimate?

A. To the best of my memory our last estimate put us over the million dollar mark.

Q. You would say then for a conservative figure, one million dollars would be a fair estimate as to what you have put out so far?

A. Yes.

Q. Does that include your salary, too, Mr. Diehl?

A. Yes, sir.

Q. Is that all paid locally here in Chattanooga or does it come from the office over at Charlotte, North Carolina?

A. Yes.

Q. Which?

A. The payroll checks.

[fol. 84] Q. The payroll checks?

A. The payroll checks are made on the Cleveland National Bank.

Q. What about the checks for materials?

A. The checks for materials, some are paid here locally from our general account, which is differentiated from our payroll account, and the majority are paid from our home office in Charlotte, North Carolina.

Q. Do you keep a breakdown of the figures as to how much is paid locally and how much is paid over there so that you know what your total costs are running?

A. Yes, sir, certainly do.

Q. Could you obtain the exact figure that's been paid out of the North Carolina office and give that figure along with the amount that has been paid all to date and furnish that to your attorney to be furnished to us?

A. Yes, sir.

Q. Now, in a construction project such as this, for the benefit of the record, since we have somebody with your ability here, we would like for you to explain in estimates as to what percentage is paid for services that are for wages and what percentage goes to materials.

A. An accepted rule of thumb on most anything like that, and it is a rule of thumb and not to be carried any farther and must be accepted as a rule of thumb, is about 50 per cent, 50-50.

Q. Well, say you pay out roughly speaking a half million dollars for labor and a half million dollars for material?

A. That's what it would amount to. The thing that [fol. 85] you may lose sight of is although our Rea Construction Company payroll is now somewhere around $250,000.00, I believe you would then come to the conclusion that we had only spent $500,000.00. But in that is our subcontractors' pay which ups the $500,000.00 on to close to a million or in the proximity of a million, which in turn their account is made up of material and payroll. But to us it is paid as a subcontract.

Q. Do you all pay, say, the materials for the subcontractors that are used on the project?

A. Normally no.

Q. So when you say a half million dollars in materials, that's just what the Rea Construction Company has spent itself in less than a year?

A. No, what I was giving was a rule of thumb that for construction, whether it is building a house or building a larger project, that it will come close to an average of 50 per cent material and 50 per cent labor. It varies according to the complexity of the work, complexity of the equipment installed in the work, but as I say, as a rule of thumb, it amounts to about 50 percent labor and 50 percent material.

Q. Would you say that the rule of thumb would apply to this shopping center?

A. Very closely, yes.

Q. Would you say just to use a safe amount since you have started to work here that the Rea Construction Company has paid as much as $400,000.00 for services?

A. Yes.

Q. Would you say that they paid as much as $400,000.00 for materials since you have been here?

A. It is hard for me to quote and to recollect those [fol. 86] figures accurately without having before me any of our forms which we use. I don't know whether you understand the process that is involved in handling a financial job of this nature. We have our payroll account, we have our material account and we have our general account, and for me to recollect those three figures with any degree of accuracy is rather difficult. It would be more of a guess than it would be a recollection.

Q. Will you furnish to your attorneys and have them submit it to the court reporter for an exhibit a statement as to how much has been paid out on the project since you have come here and how much of that is represented by materials and how much of it is represented by services. Can you do that from the figures you have available?

A. Yes, sir, although if we may, I would like to have it presented in four categories, one would be our labor account.

Q. All right.

A. One would be our material purchased.

Q. All right.

A. One would be our payment to subcontractors.

Q. All right.

A. And one would be payment through what we call our general account which takes care of small items. It is our policy, we don't have a petty cash and we use the general account to replace the petty cash account.

Q. The reason you want to do that, as I understand it, is because you already have it made up in that manner?

A. So that it may be accurate.

Q. Now, this list will reflect the materials, will reflect what has been paid here and by the office in North Carolina? [fol. 87] A. Yes, sir, we can make that differentiation.

Q. Can you make that to distinguish those two?

A. Yes, sir, sure can.

Mr. Fuston: May I ask Attorney Corn if you could submit that for an exhibit as soon as he has that available.

Mr. Corn: Yes.

(The document referred to above, when and if furnished, to be filed herewith marked Defendants' Exhibit No. 1, Witness Diehl.)

Q. Mr. Diehl, I believe you stated that 90 percent of your labor force was obtained from this area, is that right?

A. That is correct.

Q. What about the payroll, would the payroll reflect that 90 per cent of it is going to the labor force that is obtained from this area or would it be a less amount since people in a supervisory position like yourself and your foremen and others are drawing higher salaries perhaps than, say, a laborer or a truck driver?

A. That again could be ascertained to the very enth degree of accuracy but I don't believe it would draw the percentage below 90 per cent, no.

Q. You don't think it would?

A. Except on days like this.

Q. Well, now, as of today, how would you go about showing what you are paying for services obtained for people like yourself and the foremen that come in here from other states as distinguished from the other laborers? Don't you get some from Georgia just over the borderline here?

A. If a very, very detailed account were required it could be done, the residence of each man that is on the payroll [fol. 88] could be done, the residence of each man that is on the payroll could be ascertained from our history cards. We could then assume that he was taking his payroll check to where his residence was. That's the assumption we would have to make.

Q. I think that's a good assumption. You know that you yourself come here, your home is Pennsylvania. What about the foreman, is he from North Carolina?

A. No, several foremen. I have a foreman from Atlanta, I have one—now, when I say they are from there, that is an ambiguous statement because these boys travel the country the same as I do. They have no home.

Q. Can you furnish us a list of people, whatever address they gave you when they came to work as their permanent address? Don't they give you a permanent address when they come to work for you?

A. Yes, sir.

Q. Can you take that and distinguish those from the ones that were hired from Tennessee and show how much has been paid to one category and to the other category?

A. Yes, sir.

Q. In that that will include you, the men from Atlanta, where else do you have anybody from that you know of offhand that is in a supervisory position?

A. Well, there's two of us that are, you might say, from Tennessee. I have been in Tennessee eight years myself.

Q. Well, I thought that you said that your home was in Pennsylvania a minute ago.

A. My home, I state that as the place where I was reared. I haven't been there since before the was long enough, in fact, I haven't been any place long enough and permanently [fol. 89] fixed enough to call what is normally considered a home.

Q. In other words, you go from job to job?

A. That's right.

Q. In other words, Rea Construction Company is a big outfit and after this job is over you may go back to Pennsylvania for all you know?

A. That's right. And not only tying it to Rea, the con-

struction business is of that nature. I don't necessarily have to work and stay with Rea. I may go with somebody else.

Q. That's right.

A. But I have to go where the work is.

Q. That's right.

A. Construction work does not come to you, it is not like a sales product where you can set up a store and the people will come and buy your merchandise. In the construction industry you have to go to people and provide your services where they desire them.

Q. Well, for example—

A. (Interposing) And that is not only true of myself, but of the men that follow the trail, as we call it, or follow the industry.

Q. On a large job like this, do you have a lot of people that follow the trade, say, ironworkers that come here from all over the country?

A. No, sir, we have used all local boys on that. Our foreman.

Q. Just your foremen and your self, are they the only ones that have come in?

A. Yes.

[fol. 90] Q. How many foremen do you have?

A. We have four foremen, an assistant superintendent and an engineer.

Q. And an engineer?

A. And myself.

Q. And yourself?

A. The rest we have trained to perform.

Q. In other words, you have seven men?

A. Right.

Q. Who would be, I would assume that the foremen would be probably less paid men than the assistant superintendent, or the engineer or yourself?

A. That's correct.

Q. Are all the foremen paid the same?

A. No, it varies according to their trade that they are in, but it just happens on this particular job that they are all the same.

Q. What are they paid? Are they paid by the week?
A. By the week.
Q. By the week?
A. Salaried men.
Q. Can you tell us what their rate of pay is per week?
A. I can. Is that permissible?

Mr. Corn: All right.

A. They are paid $150.00 a week.
Q. How much is your engineer paid a week?
A. One hundred twenty-five.
Q. How about your assistant superintendent?
A. One hundred seventy. Now, I am quoting these from memory and I would like a little latitude for any fault that I may have in my memory, but I believe you will find they are correct.
Q. Are they paid whether the weather is bad or good?
A. That's correct.
[fol. 91] Q. How much are you yourself drawing?
A. I am now drawing two hundred. When the job started I was drawing one hundred ninety.
Q. In other words, you, your assistant superintendent, engineer and your foremen are in the same category, that is, you are all construction men, your next job may be in Pennsylvania, it may be over in Chattanooga, for all we know?
A. That's right. We are what you might call professional construction personnel.
Q. Have any of the other men that are here worked for Rea Construction Company for any length of time?
A. I really can't answer that one because I have never asked them specifically, although I know that one has said that he has worked for Rea.
Q. Who is that?
A. Mr. John Guledge.
Q. Mr. John—how do you spell his last name?
A. Guledge.
Q. How do you think it is spelled?
A. (Spelling) G-u-l-e-d-g-e.
Q. Where does Rea Construction Company have other jobs going on at the present time?
A. Throughout North Carolina. Offhand I don't have

the list. I have the list in my office of the jobs that are currently underway.

Q. How many jobs would you say they have currently underway?

A. What I am going by and the list I am referring to is safety report which on our last one I'd say there was in excess of eight jobs listed on it, that is including this job.

[fol. 92] Q. Does that list reflect the size of the project they are working on, in other words, for instance you've got a two—

A. (Interposing) Only to the extent that it reflects the number of employees on the job.

Q. The number of employees and that's all?

A. Yes, sir.

Q. Do they have any projects going on outside of the State of North Carolina and Tennessee that you know of?

A. Not that I know of but those reports are something that come in and you glance at them and put them in a drawer and do not pay too much attention to. That information can be obtained.

Q. Do you know that some of those jobs they work on are highway jobs, interstate highway?

A. Some of Rea Construction Company operations is highway construction whether it is interstate or intrastate, I am in no position to distinguish between the two.

Q. Did you have such information sheets to come to you from the very beginning of this project?

A. I wonder, as for your third exhibit, if you will file with your attorneys to be marked an exhibit, if you will file with your attorneys to be marked an exhibit to this your testimony, a copy of the first one that you have on file when you come to work here and also the last one that you have?

A. Yes, sir.

(The documents referred to above, when and if furnished, to be filed herewith marked Defendants' Exhibit No. 3, Witness Diehl.)

[fol. 93] Q. On your direct examination I believe you stated that 90 percent was, from the best of your knowledge,

would be considered people from Tennessee and 10 per cent from out of the State, whatever state you don't know?

A. Yes.

Q. That's just an estimate?

A. Just an estimate.

Q. In other words, the figures that you are going to submit will probably be more accurate than what you have stated here?

A. I do not understand at this time that you had requested that we break down our employees.

Q. I understood—

A. (Interposing) From the standpoint of their home address. If that is your request.

Q. That is my request now.

A. It can be done.

Q. That is to be marked Exhibit 2, is the list that you have that is with the home address they gave when they came here and show how much they have been paid as opposed to the other people.

Mr. Chambliss: Wait a minute, Del, that's not very clear.

Mr. Fuston: In other words, he's got an address for each person that comes to work here, they gave Atlanta, Georgia or they gave Calhoun.

Mr. Chambliss: Suppose they give Tennessee.

Mr. Fuston: If they give Tennessee he is going to put them in one category and everybody that gave an address [fol. 94] out of the State he is going to put in another category. He is going to show how much he paid those people that gave addresses out of the State and how much he paid Tennessee people. You understand that?

The Witness: Yes.

Mr. Chambliss: You realize he's been in Tennessee eight years?

Mr. Fuston: I understand he's made that statement now but I am asking him to put down what he gave as his home address, in other words, he considers himself a man—

The Witness: (Interposing) No home.

Mr. Fuston: No home, in other words, he is part of the floating population. All of these men here in the building trades understand that because we have our own members

at Cape Canaveral and in Alaska right now from Chattanooga. They go where they can get work.

Q. You made the statement to your attorney, Mr. Corn, that on this project that 75 per cent of it was purchased right here in Tennessee. Is that by a rule of thumb or how did you arrive at that percentage?

A. No, that is by my own estimate having the knowledge that we purchased our concrete from this local plant, we have bought our floor material, with the exception of the plywood, which I have said, from a local supplier, we purchased our stone fillets from Bradley or Meigs County, which I believe both could be very well considered local.

Q. Let me ask you this, this is just for general information while I am on that, you were talking about this lumber. How did you pronounce that name?

A. Conasauga.

[fol. 95] Q. Do you know whether Conasauga is in Tennessee or in Georgia?

Mr. Chambliss: You mean the town or the Lumber Company?

Mr. Fuston: The Lumber Company.

A. It is my understanding that it is still in the State of Tennessee although very close to the Georgia Border.

Q. Do you understand that the timber comes from the State of Georgia or it is cut here in Tennessee?

A. I never asked them that, I asked them if their framing lumber, if they cut it locally and they said they did.

Q. Well, getting to the question—

A. (interposing) Whether that meant it was local which might infringe partly upon Georgia and partly in Tennessee I am not in position to say.

Q. But based upon that you say 75 per cent of it came from Tennessee, in other words, just 25 per cent comes from out of the state, is that right?

A. Yes.

Q. Now, let me ask you this since you are a graduate engineer and have been on these big projects before, would you say that is pretty much of a rule of thumb, too, that on a project such as this nature that 75 per cent of it is

usually purchased within the state and 25 per cent from out of the state?

A. No, that didn't come from a rule of thumb. It could, to all degrees when you get into a complex reinforced concrete building which requires special forms, many times you use patent forms which your boys are well aware of and know, come from wherever the man happens to [fol. 96] have the low price happens to have his headquarters.

Q. Does the Rea Construction Company—is the Rea construction engages in building of any other similar shopping areas now that you know of?

A. No, no other shopping center.

Q. Have you ever built one in the past year or two that you know of?

A. I have not or previous coming to work for Rea, I did not keep up with their activities. That could be ascertained.

Q. Can you obtain from Rea Construction Company the following information: The amount of materials purchased by the Rea Construction Company of all projects for the year 1960 and 1959?

Mr. Corn: Let me interpolate that, that I don't think this witness can promise to give you that.

Mr. Fuston: I know he will have to go back to the home office for it.

Mr. Chambliss: What is the relevancy of that?

Mr. Fuston: Since that counsel will not stipulate that Rea Construction Company is not in interstate commerce it becomes highly important.

Mr. Chambliss: I don't think it is.

Mr. Fuston: What?

Mr. Chambliss: I don't think it is highly important. I don't think it is important at all. I think this, that before that is done, Del, what we ought to do is get a ruling from the Chancellor about it.

Mr. Fuston: Here is the thing about it and I want this to go in the record, that the Court has held that at the [fol. 97] present time he cannot tell whether this Rea Construction Company, the complainant in this cause, is engaged in intrastate commerce or in interstate commerce,

and he wants the record clarified as to that point because if it is in interstate commerce there is one set of laws that apply and if it is in intrastate commerce, there is another set of laws that apply.

Mr. Chambliss: It is my understanding that he didn't ask for that to be clarified but on the contrary he held that regardless of whether it is interstate or intrastate it was immaterial because he ruled there was no labor dispute involved and that's why I suggest that before we go through all this procedure that you are asking for that we go to the Chancellor and get a ruling on it. Now, if he says we have to do it, why, that's all right, but I think we ought to get a ruling on it.

All right, sir, will you submit this other information that I have asked for and then it may not even be necessary to get that, I will put it that way, but we will go to the Chancellor to ask for it because it may become very necessary to this case or it may not.

Mr. Chambliss: That's right.

Q. At the time for the picketing began at this project, you were familiar with the McKinney Drilling or Coring Company, whatever it was called?

A. McKinney Drilling Company.

Q. Do you know anything about the size of that company?

A. Only their reputation, they are reputed to be one of the largest of the drilled-in caisson people in this country along with Guild and Raymond.

Q. I believe that the Lomas or the Oslo Construction [fol. 98] Company was on the project, too?

A. That's correct.

Q. So you know anything about their size?

A. Dollarwise, no. I know they had sufficient equipment to efficiently handle the site work in the contract that they were engaged in on this job. The equipment they had visible and in use there, which I assume was their own, I would judge would 120, $130,000.00, whether or not that is liquidated price, the new price would be far in excess of that.

Q. Are you familiar with the wage scale for labor paid on this project to date?

A. Yes, sir.

Q. What were they paid when you began work here in August of 1960?

A. We allowed some latitude there. We paid labor from $1.25 to $1.50.

Q. Dollar and quarter to $1.50?

A. And subsequently raised some as high as $1.75.

Q. Were you aware of the fact that the union labor scale by the Hodcarriers Union of Chattanooga, which comprises Bradley County, Marion County and other counties, is $2.00 an hour?

A. No, sir, nobody furnished me with that information.

Q. What did you pay carpenters?

A. We paid them and are paying them and you can qualify that previous statement to the present, from $2.00 to $2.75.

Q. And say in August and September about the time that this picketing began, you were paying $2.00 and some as high as $2.75?

A. We paid according to the apparent skill of the man. [fol. 99] Q. You don't take into consideration anything else except the apparent skill of the man and what he would work for is that right?

A. The apparent skill of the man.

Q. That is the only thing?

A. That is correct.

Q. What did you pay your plumbers?

A. The plumbers are under subcontract and I have no knowledge of their payment.

Q. Who is your subcontractor for your plumbers, by the way?

A. Blount Plumbing and Heating Company, Maryville, Tennessee.

Q. What did you pay your operating engineers?

A. At that time we had none.

Q. They were paid by Lonas, I assume?

A. We had no operating engineers as I previously stated. I was the only one on the payroll.

Q. What did you pay your bricklayers?

A. We had at that time no bricklayers and we have had to present no bricklayers.

Q. Were you aware of the fact that prior to this picketing taking place that the McKinney Company was using laborers and paying them $1.50 an hour?

A. No, sir.

Q. Did you know they were using laborers?

A. I certainly know that they were using laborers.

Q. But you had no idea what they were paying them?

A. I had no idea and had no reason to delve into the subject. We had a subcontract for that work and that was, to put it bluntly, none of my business.

Q. What about making subcontracts, who made those subcontracts?

[fol. 100] A. They were made by our branch office in Atlanta, Georgia.

Q. In other words, the concern that you work for has a branch office in Atlanta?

A. That is correct.

Q. What is their location there?

A. They moved recently. It is on Lambert Drive. The number I'd have to check.

Q. Do they have branch offices in any other states?

A. No, to my knowledge, there is no other.

Q. Did you have anything to do with letting the subcontracts?

A. Not the subcontracts that were in force at the time of the picketing. Subsequent subcontracts, I have been involved in, yes, sir.

Q. I mean, in other words, you make the recommendation to the Atlanta office or do they just send a subcontractor in?

A. Prior to my coming on the job the subcontracts were let and as they reported to the job they did the work.

Q. But since that time do you make a recommendation to the Atlanta office on all subcontracts?

A. I go over their proposal with the personnel of the Atlanta office.

Q. Isn't it true that you have told various subcontractors that have approached you in regard to getting a subcontract that your company is not interested if they hire union personnel?

A. No, sir, I have never made that statement. The only

statement I have ever made is the statement that this job [fol. 101] is being worked open shop, union laborers, union subcontractors are as welcome as anybody else, that we are working open shop according to the State Open Shop Law of the State of Tennessee.

Q. Have you been advised that you are permitted under the law to hire union contractors that hire all union personnel if the work you are engaged in involves interstate commerce?

A. Would you repeat that question, please?

Q. I will ask you if you have been advised that you are permitted to hire union contractors, contractors that hire all union personnel if you are engaged in interstate commerce?

A. I don't know that I could say that I have been advised. I am aware of the fact, yes, through my own knowledge, through my own reading.

Q. This contract had already been let before you came, I understand?

A. Yes, sir.

Q. When this picket first appeared I believe there was only one picket, is that right?

A. There was only one picket. Somebody brought him to the site in a car. I don't know who. I assume that he could be called a picket or be any other nomenclature, other than he had some mode of transportation for arriving at the site.

Q. At that time Lonas was doing the heavy grading, the operating engineer on the job, on the project, is that correct?

A. They were doing the site excavation, yes, sir.

Q. How many people did they have working there at that time, if you recall?

[fol. 102] A. Subject to verification from the records, I would estimate approximately ten people.

Q. After the picket are you stating to the Court that all ten of those operators quit?

A. Yes, sir, I am.

Q. And what about the men working for the McKinney Company?

A. The same is true of them. They would not work and would not cross the picket line.

Q. Were you informed at that time by anyone that one of the reasons that the picket was placed there was because of the fact that the McKinney Company was not paying their laborers who were working on the project the union scale?

A. No, sir, nobody advised me of any reason for the picket. He appeared and that's the extent of my knowledge.

Q. Did you make any inquiry from the Chattanooga Building Trades yourself, since you were the head man, apparently to find out why the picket was there?

A. No, sir, I did not.

Q. Then you knew pretty well why he was there?

A. No, sir.

Q. Because you didn't have a contract with the Chattanooga Building Trades?

A. That's what the sign said.

Q. You knew that to be true?

A. I knew we had no contract with them, that is correct.

Q. You knew that is why they had the picket?

A. No, I didn't know other than assumption.

Q. Did you particularly care why they had the picket there?

[fol. 103] A. No, sir.

Q. It didn't bother you one way or the other?

A. No, sir, because we had told and I specifically myself had told anyone that applied for a job there that we were working open shop and anybody that wished to work was welcome to work if they had the skill to work.

Q. And that's the policy of Rea Construction Company, I believe, in North Carolina, Georgia, wherever they happen to be working?

A. That's right.

Q. Mr. Diehl, I believe you say you have a plumbing concern that's a subcontractor and you don't know the rate, of course, that he is paying his men, is that correct?

A. No, sir, I do not.

Q. I will ask you if one, at least on plumbing subcontractor submitted a bid who is union and was lower than this particular company that you hired?

A. No, sir.

Q. You remember any union plumber that submitted a bid on the job?

A. Truthfully, of the contractors that submitted a bid I couldn't distinguish or differentiate between the ones that are union and the ones that are not union.

Q. Are you saying that you gave the bit—

A. (Interposing) I do not have in my own knowledge the fact that Blount Plumbing and Heating is not union because I have never seen fit to ask them. It is none of my business. They may be union. I don't know.

Q. You don't know?

A. I don't know.

Q. You haven't bothered to find out one way or the other?

[fol. 104] A. That is correct.

Q. Who does the pan forms on your project now?

A. The metal forms?

Q. Yes.

A. The Southern GF Company of Atlanta.

Q. Outside of Rea Construction Company what would you say is your largest subcontractor working on the project now?

A. You mean company size or in the dollar value of their subcontract?

Q. Dollarwise.

A. Lonas Construction Company.

Q. They are still doing some work there?

A. Yes, sir.

Mr. Fuston: I believe that's all, Mr. Diehl. Appreciate your coming in.

Mr. Corn: That's all.

Further This Deponent Saith Not.

(Signature waived.)

Sworn to and signature waived before me this 22nd day of February, 1961.

Casey B. Smith, Notary Public at Large. My Commission expires October 9, 1962.

[fol. 156]

EXHIBITS 1 AND 2 TO TESTIMONY OF FRITZ DIEHL

1. Amounts which have been paid on project for:

(To date of hearing or to date of last payment to labor)

a. Labor—$137,782.94

b. Materials—$281,950.25

c. Amount paid sub-contractors—$141,314.78

d. Material bought in Tennessee—$134,850.58

e. Material bought from sources outside Tennessee—$147,099.67

2. Paid Tennessee Labor: Supervisory $10,647.00 Manual $113,557.94

3. Paid imported labor—$13,578.00

4. Number of individuals "imported" for job—6.

5. Number of individuals employed from Tennessee Labor Forces—226.

[fol. 157]

EXHIBIT 3 TO TESTIMONY OF FRITZ DIEHL

See Opposite ☞

REA CONSTRUCTION COMPANY
TABULATION OF ACCIDENT REPORT
AUGUST, 1960.

		MANHOURS		ACCIDENTS		DAYS LOST		FREQUENCY		SEVERITY	
	No. Emps.	August	11 Mos.	August	11 Mos.	August	Mos	Aug.	Mos	August	Mos.
Asphalt Division	115	22,124	217,535	2	13	72	6,341	90.40	59.76	3,254.38	29,149.33
Phy. Ed. Bldg-State Col.	51	7,794	181,265	00	11	0	91	.00	60.68	.00	502.03
Roanoke Sew. Treat Plt.	35	5,666	46,365	0	3	0	49	.00	64.70	.00	1,056.83
Dana Bldg.--Queens	12	1,047	25,510	0	3	0	47	.00	117.60	.00	1,842.41
Ct. Co. Day School	46	6,333	42,921	0	2	0	9	.00	46.50	.00	209.89
Orange-Durham Cos.	147	24,256	47,564	1	1	18	18	41.23	21.02	742.08	378.44
Greenland	19	5,175	38,401	0	0	0	0	.00	.00	.00	.00
East Side Sew. Plant	21	3,241	4,235	0	0	0	0	.00	.00	.00	.00
Hotel Charlotte Alt.	5	638	1,066	0	0	0	0	.00	.00	.00	.00
Carol Hall--Queens	9	642	899	0	0	0	0	.00	.00	.00	.00
Village Shopping Center	2	200	200	0	0	0	0	.00	.00	.00	.00
Shaw Distb. Co.	8	182	182	0	0	0	0	.00	.00	.00	.00
Completed	-	-	170.602	-	5	-	61	-	29.31	-	357.56
Total	470	77,298	776,745	3	38	90	6,616	38.81	48.92	1,164.33	8,517.60

INJURY RECAPITULATION FOR AUGUST, 1960

Location	Date	Name of Employee	Type of Injury	Cause of Injury
Asphalt Division	7-26-60	Grover Whitworth	Broken bone- right foot	
Asphalt Division	8-3-60	Robert Beatty	Stomach Cramps	Heat
Orange-Durham Cos.	8-13-60	Fletcher Smith	Broken & Cut left foot	Cleaning screeds on concrete spreader and caught foot between screed and form pin

[fol. 158]

EXHIBIT 3 TO TESTIMONY OF FRITZ DIEHL

See Opposite ☞

RLA CONSTRUCTION COMPANY
TABULATION OF ACCIDENT REPORT
JANUARY, 1961

	No. Emps	MANHOURS Jan	MANHOURS 4 Mos	ACCIDENTS Jan	ACCIDENTS 4 Mos	DAYS LOST Jan	DAYS LOST 4 Mos	FREQUENCY Jan	FREQUENCY 4 Mos	SEVERITY Jan	SEVERITY 4 Mos
Charlotte Asphalt	26	4,895	25,303	0	1	31	113	.00	39.52	6,332.99	4,405.87
Richmond Co.	16	2,777	20,927	0	1	31	138	.00	47.79	11,163.13	6,594.35
Phy. Ed. Bldg. State Col	25	4,440	24,894	0	0	0	0	.00	.00	.00	.00
Orange-Durham Cos.	25	3,264	56,079	0	1	0	31	.00	17.83	.00	552.79
East Side Sew.Plant	42	6,500	28,645	0	0	0	0	.00	.00	.00	.00
Village Shopping Center	132	22,339	47,569	0	0	0	0	.00	.00	.00	.00
Wachovia Bank S Tryon	4	174	299	0	0	0	0	.00	.00	.00	.00
State House	2	352	352	0	0	0	0	.00	.00	.00	.00
Completed	-	-	18,344	-	0	-	0	-	.00	-	.00
TOTAL	272	44,731	222,412	0	3	62	282	.00	13.49	1,385.06	1,257.92

[fol. 159] Deposition of THOMAS C. ELKINS, the first witness, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Fuston:

Q. Will you state your name, please?
A. Thomas C. Elkins.
Q. Where do you live, Mr. Elkins?
A. I live at 1765 Glenwood Avenue, Cleveland, Tennessee.
Q. How long have you been a resident of Bradley County?
A. All my life.
Q. What do you do for a living?
A. I am assistant business manager for Laborers and Hodcarriers Local 846.
Q. Is that the labor union that has jurisdiction over labor in Bradley County, Hamilton County and other counties with offices in Chattanooga, Tennessee?
[fol. 160] A. Fourteen counties.
Q. How many business agents does the local have?
A. It has one business agent and two assistants.
Q. And you are one of the assistants?
A. That's right.
Q. I will ask you if among your duties is to cover and keep up with your men, see that whatever their rights are to their contracts being enforced?
A. That's right.
Q. Do you recall last year when work first began out here on The Village, the shopping center that's been under discussion here all day, that you passed by and had occasion to talk to people there?
A. Yes, sir, I did.
Q. About when was that, do you remember?
A. It was on a Thursday, I couldn't tell you the exact date. I should know because it was election day.
Q. Was it Thursday of the week preceding the day that the picket went up?
A. That's right, on Thursday before the picket went on on Monday, that's right.

Q. And you were passing there and what happened?

A. Well, I seen they started work and of course, a job of that size, I was naturally interested in it so I just drove up there to watch them. I seen some of our members working there.

Q. That's members of 846, Hodcarriers Union?

A. That's right. So I stopped and got out and went over and talked to one or two of them and they told me, of [fol. 161] course, talking to them, they said, "We are only getting $1.50 an hour here. Is there anything that can be done about it?"

And I said, "Well, I don't know. I will talk to whoever is in charge here and see."

And I asked them to point out the man that was in charge and they did. I can't recall his name. I am like Mr. Corn here a while ago. He's with McKinney. I have his name down somewhere but I can't remember his name. But, anyhow, I talked to him and told him he had some of our members working there and they said they weren't getting the scale.

He said, "Well, I will see what I can do about it and let you know."

So I told him or gave him a copy of our working rules and wage scales and he said, "I will find out and let you know."

So, of course, I made a report into our office in Chattanooga about it which was the usual procedure, and was informed that a picket had been authorized for the job, for me to come to Chattanooga and pick up the picket sign. So I did and was also asked if I could get a local labor member of our organization that lived here to carry the picket, which I did. I went to Chattanooga and got the sign and gave it to the fellow that was to carry it and he started carrying it on Monday morning. Shortly, I guess it was after work time, why, I received a telephone call from this gentleman that I talked with down there that I can't recall his name with McKinney, about the picket and I told him that I didn't have anything to do with the picket, it was Building Trades' picket and gave him a number and the Building Trades' office in Chattanooga [fol. 162] and told him to call there and get his information.

Q. I believe that picket was removed after the injunction was served?

A. That's right. I passed by there about, I guess ten o'clock that morning on my way to Chattanooga and when I got to Chattanooga I had a phone call waiting on me that papers had been served on the picket.

Q. I believe you delivered the check to the man, paid the picket for the time he worked or carried the picket?

A. That's right, I did.

Q. That was from the Chattanooga Building Trades?

A. That's right.

Q. Did the Hodcarriers pay the man anything?

A. No, sir.

Q. Were the Hodcarriers, your local 846 or anybody else involved other than Chattanooga Building Trades, to your knowledge?

A. No, sir, it was the Building Trades' picket sign authorized by the Building Trades.

Mr. Fuston: You can ask him.

Cross examination.

By Mr. Chambliss:

Q. Mr. Elkins, is the Hodcarriers Union a part of the Building Trades?

A. Yes, sir.

Q. I believe you selected the man who was to do the picketing?

A. Yes, sir.

Q. You carried him to the site?

[fol. 163] A. No, sir. He drove his own car.

Q. Did you furnish him with a picket sign?

A. Yes, sir, I did.

Q. What was the man's name?

A. I believe his last name is Liner. I believe his first name is O'Neil. I believe I am correct in that.

Q. O'Neil Liner?

A. I believe that's right.

Q. Did you have any interest, Mr. Elkins, in your union having a contract for this job?

A. Well, I had an interest in seeing that our members received our wage scale.

Q. Did it make any difference to you whether non-union men worked on the job or not?

A. Well, I understand that he has some non-union there as well as our members.

Q. I say, did that make any difference to you?

A. Well, no, sir.

Q. In other words, you don't mind whether they work union men or non-union men?

A. Well, I would try to get membership, I would try to enlist the men in our union.

Q. Did you ask this man down there at the Village anything about contracting with the Building Trades, Chattanooga Building Trades?

A. No, sir.

Q. Did you ask anything about contracting at all?

A. No, sir.

Q. In other words, it made no difference to you whether he had a contract with the Building Trades or not?

[fol. 164] A. Well, like I say, we are always interested in getting work and wage scales and conditions for our members.

Mr. Chambliss: That's all.

Mr. Fuston: That's all.

Further This Deponent Saith Not.

(Signature waived.)

Sworn to and signature waived before me this 22nd day of February, 1961.

Casey B. Smith, Notary Public at Large. My Commission expires October 9, 1962.

[fol. 172] [File endorsement omitted]

IN THE CHANCERY COURT, BRADLEY COUNTY
CLEVELAND, TENNESSEE
No. 6377

JAFCO, INC., et al., Complainants,
vs.
N. L. LINER, et al., Defendants.

APPEARANCES:

James F. Corn, Esq., and Jac Chambliss, Esq., of Chambliss, Chambliss & Brown, Solicitors for Complainants.

Del Fuston, Esq., of King & Fuston, Solicitors for Defendants.

February 22, 1961

DISCOVERY DEPOSITION OF C. EARLE WILLIAMS—
Filed June 2, 1961

[fol. 173] The deposition of C. Earle Williams, called as a witness at the instance of the complainants, taken by agreement, for purposes of discovery, pursuant to the provisions of TCA 24-1201, et seq., at the law offices of James F. Corn, Cleveland, Tennessee, on February 22, 1961, before Casey B. Smith, notary public and court reporter.

It is agreed by and between counsel for the respective parties that all formalities are waived; that the witness' reading of the deposition and his signature thereto are also expressly waived. All objections, except as to the form of the questions, are reserved to on or before the hearing.

C. EARLE WILLIAMS, the said witness, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Chamblee:

Q. What is your name, please, sir?
A. C. Earle (spelling) E-a-r-l-e Williams.
Q. Where do you live, Mr. Williams?
A. 823 South Germantown Road.
Q. What is your job?
A. I am business manager for the Plumbers and Steamfitters, Local 43.
Q. Do you have any position with the Chattanooga Building Trades Council?
A. President of the Building Trades Council.
Q. What was the first that you knew, Mr. Williams, of the job, the construction job being done by Jafco, Incorpo- [fol. 174] rated, and Rea Construction Company, who are the complainants in this case?
A. Well, it's been a good while ago, but, of course, the first that I would know about it would be when the Jafco originally planned to start their project.
Q. Was that sometime last year or was it prior to that?
A. That would have been last year, 1960.
Q. How did it come to your attention?
A. Well, we have many people who are members of organized labor who live in this area and information come from different sources. I don't remember how it came.
Q. What was that information that you got?
A. Well, originally it was that Jafco was to construct this shopping center here.
Q. You mean the shopping center here at Cleveland?
A. Yes.
Q. Did you do anything about that, I mean, about trying to get them to employ union labor there?
A. No, sir.
Q. Did you have any interest in whether they employed labor or not?
A. Well, naturally, we have interest in all contract work

all construction work, from the standpoint of union wages and working conditions.

Q. Do you have any interest from the standpoint of having a contract with the contractors whereby they would employ union people?

A. You mean with Jafco?

Q. Well, you were speaking generally, I think about con- [fol. 175] tracts and contractors in the area. You said you had an interest in their paying union wages and having good working conditions and I meant just generally do you have any interest, does your organization have any interest in whether they have contracts with the union?

A. Yes, sir, we have an interest.

Q. Did you have any interest in whether Jafco had a contract to use union labor?

A. Our interest was that, yes, sir.

Q. Did you do anything about it?

A. No, sir.

Q. Did you take any action at all with reference to Jafco and this job up here that was being done?

A. I don't know what you mean by any action. Do you mean that I came and talked to Jafco?

Q. Did you come or anyone else from the labor organization come, that you know of?

A. I don't know. I did not come and talk to anybody.

Q. Do you know of anyone else who did?

A. I don't know, no, sir.

Q. Will you then outline in your own words how it was that a picket happened to be sent up here by the organization of which you are president?

A. Well, originally our information was that Jafco would do this shopping center here and then later it was brought to our attention that Rea Construction Company had been awarded the contract. Now, our reports from the people on the job who were working on the job were that they were not paying the union wage rate, the prevailing wage rate in this area, and the council voted to place a picket on [fol. 176] the Rea Construction Company to advertise that they were not paying the union rate on the job.

Q. What was the union rate?

A. Well, the rate would differ, of course, according to crafts. For example, the labor rate would be two twenty, I believe—two ten, and they were paying $1.50.

Q. Who was on this council that took this action?

A. I couldn't say who was at the meeting. Practically all the members of the council were there. There may have been one or two that were not there.

Q. Can you name the people who were on the council and the organizations they are with?

A. I think I can. Now, of course, there's myself, there's Bill—

Q. (Interposing) Now, you are with the Plumbers Union?

A. That's right.

Q. And there is who?

A. Bill Smelley.

Q. How do you spell that?

A. (Spelling) S-m-e-l-l-e-y, who is the secretary of the council. And there is Julius Hatfield—

Mr. Fuston: (Interposing) Tell the name of the union as you go along so you won't have to back up.

A. (Continuing) Smelley is with the Painters Union.

Q. That's good.

A. And Julius Hatfield is with the Ironworkers. Joe Hennessey is with the Sheetmetal Workers. Sherley Timmons is with the Carpenters Union. Melvin Williams is with the Electricians Union. Can you think of who else, Raymond?

[fol. 177] Mr. Floyd: Operators.

A. Clyde Allen is with the Operating Engineers.

Mr. Fuston: What about truck drivers?

Mr. Floyd: George Hicks.

A. George Hicks is with the Teamsters Truck Drivers.

Mr. Floyd: Chauncey with the Cement Finishing Plasterers.

A. H. M. Chauncey with the Cement Plasterers.

Mr. Chambliss: How do you spell Chauncey?

Mr. Floyd: (Spelling) C-h-a-u-r-c-e-y.

Mr. Chambliss: He is with Cement—

Mr. Floyd: (Interposing) And Plasterers.

A. And Plasterers. I believe the Bricklayers' business agent was one that was not present.

Mr. Floyd: Charles Morris.

A. Charles Morris at that time.

Q. But you think as far as you can recall the others were there?

A. I think they were.

Q. Are minutes kept of those meetings?

A. No, sir, they are not.

Q. You don't keep any minutes of any of the meetings?

A. We keep minutes of our regular meetings which are the first Wednesday in each month, first Wednesday night in each month. We also have an executive Board meeting every Monday morning of all the business agents of which no minutes are kept.

Q. When you take a vote like this and decide to put a picket on a job, is any report of that fact made to the general membership?

[fol. 178] A. Generally, yes. However, that would be up to each individual representative to notify his local union.

Q. Was your local union involved in this situation?

A. Yes, sir.

Q. The Plumbers Union?

A. Yes, sir.

Q. Did you notify them?

A. Yes, sir.

Q. Did you just notify them verbally or did you notify them in writing?

A. Verbally.

Q. What did you tell them?

A. I told them that the Chattanooga Building Trades Council had placed a picket on the Rea Construction Company in the shopping center at Cleveland, Tennessee.

Q. Did you tell them why?

A. No, sir.

Q. Who was the picket that was sent up here?

A. I don't recall. I believe the boy's name was Lin[illegible].

Q. I think that's right.

A. To the best of my knowledge. I did not know the man.

Q. What union does he belong to, do you know?

A. I believe he was a member of the Hodcarriers, the laborers' union.

Q. Who arranged for him to be selected to come up here?

A. To the best of my knowledge, that was arranged through Mr. Elkins, who is the representative of the la- [fol. 179] borers' union in this area.

Q. Had you had any conversation with Mr. Elkins about this job at all?

A. No, sir.

Q. How did Mr. Elkins then happen to arrange that?

A. Well, I assume that he was told either through the representative of the Hodcarriers Local there or some member of the Building Trades Council.

Q. You don't know who told him?

A. No, sir.

Q. I believe you testified that your all's only objection to this job was that you understood that wages were being paid that were lower than the union scale?

A. That was one of the objections, yes, sir.

Q. What were the other objections?

A. Well, working conditions.

Q. Like what?

A. Well, you can't say like what, Jac, possibly overtime rates, things that our agreement called for that were not being done on this particular job.

Q. Can you cite any things that your agreement would call for that were not being done?

A. No, I personally can't.

Q. Had you heard of any?

A. Yes, sir.

Q. What?

A. Well, the question that they were not paying overtime rates, they were working people more than forty hours.

Q. They were doing what?

A. Working people more than forty hours and paying [fol. 180] them straight time.

Q. But it was not a part of your grievance, if you want to call it that, or your unhappiness about the job that they failed to have a union contract, was it?

A. We would rather see them have a union contract, naturally.

Q. Was that one of the reasons why you put the picket on?

A. We put the picket on there to advertise to the public that the contractor was not paying the rate, the union rate, and not meeting the working conditions.

Q. Do you know what language that picket carried on his sign?

A. I believe we have that as a matter of record, but I am sure that the picket sign says, "This job, Rea Construction Company, not under contract to the Chattanooga Building Trades Council."

Q. Was there anything on that sign that had anything to do about not paying wages?

A. Well, I would say yes.

Q. What was on there?

A. If they were under contract with the Chattanooga Building Trades Council they would be paying the wage rate.

Q. Was there anything on there about their not coming up to certain working conditions?

A. No, sir.

Q. In other words, the only language on there was that they were not under contract?

A. Yes, sir.

Q. And as you say, all these other grievances that you [fol. 181] felt existed about their not paying the wage scale, would have disappeared had they gone under a contract?

A. Our people who are under contract, we don't have that trouble with them.

Q. So you were hopeful that by putting that there, why, you would solve the problem, is that correct?

A. No, I don't think that there was ever any thoughts that that problem could be solved. We were just hopeful to advertise to the people who live and work here that the situation was not good and we hoped that on future contracts, similar, that it would have an effect.

Q. You had no interest, in other words, in trying to get a contract on that job?

A. We had the interest, we didn't have any hopes of getting it.

Q. But you were interested in getting it, if you could?

A. We are interested in getting every construction job that's built if we possibly can legally.

Q. And if Rea Construction had come to you and said, now, you have put your picket here about our not being under contract and we are willing to go under contract, you would have removed the picket, wouldn't you?

A. Wouldn't have any reason to picket if they had went under contract.

Q. Now, Mr. Williams, how many years have you been active in the labor movement?

A. Twenty-four.

Q. How many years have you been an official of the Chattanooga Building Trades Council?

[fol. 182] A. I was in three years and then I was out two and I have been back two, that will be a total of five years, I guess.

Q. From your experience, of course, you know that when contracts are made to build shopping centers like this there is usually a time limit within which the job is to be done under a contract like that, don't you?

A. That's standard, yes.

Q. You know that if that is not done within a certain time there is a penalty generally involved, is there not?

A. Generally, but I know also that there are usually provisions put in there in case of labor trouble, et cetera, et cetera, the penalty does not apply.

Q. Was this labor trouble, would you characterize this activity as labor trouble?

A. Yes, sir.

Q. Was there any labor dispute of any kind in existence at that time between the Chattanooga Building Trades Council on the one hand or the unions connected with it and Jafco and Rea Construction Company, was there any labor dispute in existence between them?

A. Directly, I guess not. I mean, I don't know of any particular item.

Q. In other words, you had not been to them, the unions had not been to them to discuss any matters or ask them anything at all?

A. Well, I couldn't say that the unions hadn't been. I have never talked to anybody either with Rea or with Jafco.

Q. So far as you know, no union representative had ever talked to them about having contracts on this job?

[fol. 183] A. I don't know of it.

Q. So far as you know, then, the Chattanooga Building Trades Council had never sought from these parties a contract, is that right?

A. That's correct.

Q. If you have a contractor or if your organization, the Chattanooga Building Trades Council, has a contract with a contractor like Rea Construction Company, Mr. Williams, is it all right for that contractor to employ both union and non-union labor on that job or is he required to employ only union labor on the job?

A. He could employ—the setup that we have in my individual local union, the contractor hires all of his people from us who can be union or non-union or on a non-discriminatory basis.

Q. In other words, under your contract he hires all his people from you?

A. That's right.

Q. Now, you say that you send out non-union as well as union people?

A. We have that provision, yes, sir.

Q. When is the last time you sent out a non-union man?

A. I can't even send out union people. We don't have any work for them at the present time, haven't had for a year and a half.

Q. In the past, I mean, not know.

A. We haven't had this setup only about since last June. I haven't sent any out.

Q. You have never sent out a non-union man?

[fol. 184] A. No, sir, but the provision is there if he is qualified and he wants to come in and register, he will be sent out when his turn comes.

Q. This is something that's new to me, Earle. You mean to say that non-union members or construction people have

the privilege of coming to the union hall and registering for work?

A. That's right, non-discriminatory hire hall procedure.

Q. And then if you get a call for workers of the class to which that person belongs, you will send out those people?

A. That's right.

Q. Which you say you have never done?

A. No, sir.

Q. Is there anyone or has any non-union person ever come in and registered at the hall?

A. No, sir.

Q. Under your contract or under your procedure with contractors such as Rea Construction, would it be all right if they would, while employing your people, Chattanooga Building Trades people, hire someone directly themselves who was not a member of a union?

A. I would say that would depend on the particular craft.

Q. Explain that.

A. I can only speak for my particular craft because I don't furnish electricians, I don't furnish the labor and so on and so forth, but under the existing laws and under the —to the best of my knowledge, it is perfectly legal for a [fol. 185] contractor to sign a contract that he will hire all of his plumbers from us providing we have a non-discriminatory hiring hall practice set up. Therefore, as far as I was concerned, it would not be all right for one of my contractors to hire somebody without hiring them from us when we have an agreement that they will hire exclusively from us.

Q. And the Building Trades Council, does it have that same setup?

A. Building Trades Council does not have any setup for the placement of men. That is each individual business manager's job with his local union.

Q. When you had this sign then on this picket that said not under contract, with what building trades council, what type of contract would the Chattanooga Building Trades Council have with the contractor?

A. We have many general contractors who agree with us that they will hire their people from the Chattanooga Building Trades Council and affiliated crafts.

Q. Do you have a form of contract that you use with people?

A. We had a form of contract. I don't think that any of those have been signed, actively signed for several years, but at one time we did have that agreement for them.

Q. If you had wanted to sign a contractor, if Jafco and Rea Construction had wanted to sign a contract, do you have a form of contract that you would have signed with them?

A. Not as far as the building trades, not a written contract. It would have been verbal. But let's face the fact, Rea Construction has never signed a union contract with anybody.

[fol. 186] Q. How long have you known Rea Construction?

A. Since they branched out to J. A. Jones.

Q. How long has that been?

A. It's been several years ago.

Q. In other words, this sign that the picket wore about not under contract refers to an oral contract and not a written contract?

A. As far as the building trades is concerned, yes.

Q. Well, the building trades was the only one who was complaining of having no contract, weren't they?

A. Well, the building trades is composed of seventeen building crafts. The business agent for each individual craft is a member of the executive board of the building trades, automatically.

Q. Are there any other construction companies or contracts in the area around Cleveland and Chatanooga that are not under contract with the Chatanooga Building Trades Council?

A. Many of them.

Q. Now, this picket, Mr. Liner, was he employed by the Chattanooga Building Trades Council?

A. He was paid by the Chattanooga Building Trades Council, yes, sir.

Q. And the Chattanooga Building Trades Council consists of all these different unions that you have mentioned?

A. Yes, sir, and I believe one or two that I didn't mention, I didn't think of, but there are seventeen.

Q. There are how many?

A. Seventeen.

Q. I wonder, Earle, if you would file and you could furnish it through Mr. Fuston later, a list of all the different labor organizations that do comprise the Chattanooga [fol. 187] Building Trades Council?

A. Affiliated with the council?

Q. Yes, and you could file that as Exhibit 1 to your testimony here.

Mr. Fuston: It is all right.

A. Yes.

(The information requested above, when and if furnished, to be filed herewith marked Complainants' Exhibit No. 1, Witness Williams.)

Q. I believe you stated that you had no hope of Rea Construction Company signing a contract, is that correct?

A. That's correct.

Q. Was that because of your knowledge that in the past they had been non-union?

A. That was part of it and then plus the fact that they were telling our union contractors who were bidding the jobs that they didn't want any union people on the job.

Q. In so far as Jafco was concerned, though, they had no such record, did they?

A. Well, I am a little confused about Jafco. I never heard of them until this thing came up, and when the original complaint was filed it mentioned Jafco and then it was amended, I believe, to change to Rea, so they lost me somewhere in the shuffle. I never heard of Jafco prior to the time they were formulating plans for this job up here.

Q. But you did understand that Jafco was the company that was going to own the property and have the building put up?

A. Were supplying the money.

Q. Yes, they were supplying the money and they were the ones then who had a contract with Rea Construction [fol. 188] Company, as you understood it?

A. That's correct.

Q. And if Rea Construction Company would not make a

contract with the Chattanooga Building Trades Council then in order for the Chattanooga Building Trades Council to get a contract it would be necessary for Jafco to do something about it, wouldn't it?

A. I would assume. I mean, you are getting into a phase of business there that I just wouldn't be familiar with.

Q. In other words, in order to accomplish the result of your having a contract it would be necessary for Jafco to get rid of Rea Construction Company and give it to somebody that would make a contract with your organization, would it not?

A. No, I wouldn't think so, Jac.

Q. Well, how else could it be done if Rea would not agree to it?

A. Well, as I said, I didn't have any hopes that Rea would do that.

Q. Well, having no hopes that Rea wouldn't do it, how else could Jafco accomplish that result?

A. That would be Jafco's problem. I wouldn't know about that.

Mr. Chambliss: I believe that's all.

Mr. Fuston: I have just a few questions.

Cross examination.

By Mr. Fuston:

Q. Mr. Williams, as I understand it, that when a large contractor starts on a project such as we have in this shopping center here in Cleveland or in Hamilton County [fol. 189] or Marion County or Coffee County or any other county, that you first learn who's got the contract, what particular contractor, isn't that when you first hear of it?

A. That's correct.

Q. Do you know then or do you wait until work is actually started or at any time, when do you know whether the work is to be union or non-union?

A. Well, in many cases the only way you can find out is to actually go on the job and then inquire from some of the people who are working on the job as to whether they

are getting the union scale or whether the contractor is using union people, follow it from that standpoint.

Q. Do you sometimes have certain contractors that will call you and say that they've got the job, that they will sign the verbal agreement with the building trades?

A. That's right. We have many contractors who will call us and will come in for a pre-job conference and who will sit down with us and tell us exactly what they are going to do and tell us that they want to pay our scale and work our people and primarily because they get higher skilled people from us.

Q. Do you have some large contractors that sometimes will employ their personnel from you on a certain job and then on other jobs they will use non-union?

A. Yes, we have some of those also.

Q. I will ask if the Lonas Construction Company is one of them?

A. I am not too familiar with the Lonas Construction Company, possibly one of the other witnesses could tell you more about them. However, I understand that that is true.

[fol. 190] Q. Now, about the only thing you have with the building trades contract is a verbal agreement that they will use all union personnel?

A. That's right.

Q. From affiliated crafts?

A. Yes.

Q. Do they have verbal agreements from each of the crafts or do they have written agreements with each craft?

A. They have written agreements with each craft.

Q. With each craft?

A. Or either they do employ subs who do have them.

Q. In this particular case you say work had started, that you were informed, I believe, that they were paying a dollar and a half an hour for laborers?

A. That's correct.

Q. And the wage scale was two ten?

A. That's correct.

Q. That and other things were brought to the attention of the building trades?

A. That's correct.

Q. And you all at that meeting decided to put a picket?

A. That's right.

Q. That they had not signed a contract or was not under contract for the Chattanooga Building Trades?

A. That's correct.

Q. Does the Chattanooga Building Trades cover Bradley County?

A. Yes, sir.

Q. How many counties does it cover?

[fol. 191] A. It varies some due to some crafts having a little wider area than others, but roughly a radius of fifty miles from Chattanooga.

Q. Do you have any union people in Bradley County that work in Hamilton County?

A. We have quite a few, yes.

Q. Now, the sign, I believe you stated to the best of your knowledge, stated that this job was not under contract with the Chattanooga Building Trades?

A. I believe that's correct.

Q. That sign was truthful in every respect or not?

A. That's correct, it was truthful.

Q. In that the same sign that you use on similar projects where they do not have a building contract?

A. That's the same sign that we have used for years.

Q. Do you just merely change the name of the company on that sign when you find a situation like this?

A. That's correct.

Q. I will ask you if that was the same sign that was used here in Bradley County when they had the Memorial Hospital being built?

A. That's correct, on Pritchard Lumber Company. We had a picket on that job from July till October of '59.

Q. That's here in Bradley County?

A. Bradley County Memorial Hospital.

Q. That's because they had not agreed to the building trades contract?

A. That's correct.

Q. Have you used it on similar projects in and around Chattanooga?

[fol. 192] A. We have used it on many projects in Chattanooga, the DuPont Company, we have used it at Sewanee, Tennessee, on the St. Andrews School. We are now using

it on the interchange freeway from Chattanooga to Cleveland on Michael, and another road building contractor. We have used it many, many times.

Q. Has that been for the past several years, to your own knowledge?

A. Past five or six years, to my knowledge.

Q. Same sign?

A. Same sign.

Q. Has any court ever granted an injunction against such a sign in such a situation?

A. No, the only—

Mr. Chambliss: (Interposing) Del, let me interject here. I don't suppose I have to enter any objections, I mean, I can do that at the hearing.

Mr. Fuston: That's right.

Mr. Chambliss: Of course, I think that is thoroughly objectionable.

Mr. Fuston: I don't think so.

Q. Go ahead.

A. The only legal action, to my knowledge, that has been taken at one time when we did picket DuPont Company, the NLRB issued a cease and desist order.

Q. That was, of course, based on the facts of that particular situation?

A. That's correct.

Q. As I understand it, so far as you know, no member of the Chattanooga Building Trades or any other official or [fol. 193] any other person authorized by the Chattanooga Building Trades ever approached the Jafco Corporation or the Rea Construction Company or any employer that they hire their personnel through the Chattanooga Building Trades in this particular case?

A. Well, I certainly didn't and I have no knowledge, it could have been, but I have no knowledge of it if they did.

Mr. Fuston: I believe that's all.

Mr. Chambliss: That's all.

Further This Deponent Saith Not.

(Signature waived.)

Sworn to and signature waived before me this 22nd day of February, 1961.

Casey B. Smith, Notary Public at Large. My Commission expires October 9, 1962.

[fol. 197a] MEMORANDUM ON BEHALF OF DEFENDANTS (omitted in printing).

[fol. 210] [File endorsement omitted]

EXHIBIT "A" TO MEMORANDUM—Filed June 2, 1961

Regional Director
Tenth Region, NLRB
Peachtree-Seventh Building
Atlanta, Georgia

Re: Request for Advisory Opinion
regarding Board Jurisdiction

Dear Sir:

In accordance with Section 101.41 of the Board's Rules and Regulations, Series 8, an opinion is requested as to whether the Board will assert jurisdiction over a labor dispute based upon the following facts:

JAFCO, Inc., a Tenessee Corporation, and Rea Construction Company, a corporation authorized to do business in Tennessee, have filed a suit for injunction in the Chancery Court at Cleveland, Bradley County, Tennessee, against the Chattanooga Building Trades Council, AFL., N. L. Liner, a resident of Bradley County, Local 846 of the Hodcarriers, Building and Common Laborers Union of America, Hodcarriers, Building and Common Laborers Union of America, and International, and all other strikers, pickets and sympathizers. The Docket Number of said case is No. 6377.

There have been no findings by the aforesaid Chancery Court. There are no representation, unfair labor practice cases, or other proceedings before the NLRB involving the parties herein.

In the petition for injunction which is sworn to, it is alleged as follows:

JAFCO, Inc., is building a shopping center within the city of Cleveland, Bradley County, Tennessee, which center is to cost an approximate amount of $2,000,000.00; that in connection with the building of said center JAFCO has entered into separate contracts with Rea Construction Company and Lonas Construction Company Inc., Each company operates heavy equipment. As work progressed a picket appeared on the scene with a banner which read:

> "Rea Construction Company not under Contract with Chattanooga Building Trades Council, AFL"

Thereafter the petition alleges certain violation of state law not pertinent to this request.

A hearing on jurisdiction as to the subject matter is scheduled in the state court on September 10, 1960.

We request a reply at your earliest convenience as to whether the board would assert jurisdiction under its current jurisdictional standards.

Very truly yours,

S. D. Fuston
Attorney for Chatta. Bldg.
Trades and other Defendants.

[fols. 211-212] *Duly sworn to by S. D. Fuston, jurat omitted in printing.*

[fol. 213] [File endorsement omitted]

EXHIBIT "B" TO MEMORANDUM—Filed June 2, 1961

S. Del Fuston, Esquire
King & Fuston
Chattanooga Bank Building
Chattanooga 2, Tennessee

Dear Mr. Fuston:

We regret that on the limited facts set forth in your letter of August 30, we are unable to give you the informal opinion you seek. See *Electrical Workers, Local No. 349 (Frank Schafer, Inc.)* 127 NLRB No. 34.

The Board's jurisdictional standards require a showing that a non-retail employer, such as appears to be involved in your question, has an annual inflow or outflow of goods or services from or to persons outside the state amounting to at least $50.00. See *Siemons Mailing Service*, 43 LRRM 1056; 122 NLRB No. 13; and *The Lennox-Haldeman Co.*, 127 NLRB no. 49.

The Board will generally consider, if necessary, not only the operations of the primary employer but also the operations of any secondary employers involved. See *McAllister Transfer*, 35 LRRM 1281; *Reilly Cartage Co.*, 35 LRRM 1292; and *Carpenters, etc.*, 111 NLRB 1025.

We hope the foregoing case citations will be helpful to you.

Very truly yours,

Walter Phillips
Regional Director

[fol. 214] [File endorsement omitted]

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

No. 6377

[Title omitted]

STIPULATION—Filed June 2, 1961

It is hereby stipulated by and between the parties that the letter of R. A. Nixon, dated April 17, 1961, attached hereto may be used as evidence in the above styled cause; that if the witnesses, R. A. Nixon, were called to testify that he would testify as to the same facts and statements contained in said letter.

This 18th day of April, 1961.

James F. Corn, Solicitor for Complainants.

King & Fuston, Solicitors for Defendants.

[fol. 215] EXHIBIT "A" TO STIPULATION—
Filed June 2, 1961

April 17, 1961.

TO WHOM IT MAY CONCERN:

Pursuant to an agreement between Attorneys James F. Corn and S. Del Fuston and to avoid the necessity of giving deposition I am giving the information which has been requested from me.

I am President of the Nixon Machinery & Supply Company, Inc., Any of the machinery such as Tournapull Scrapers, Adams Motor Graders or such machinery made by Le-Tourneau-Westinghouse or any other large equipment that we sell such as Graders, Pavers, Shovels, et cetera, in the years 1959 and 1960 which was sold by thi company would

have come from out of State. I know this information to be true from out own records.

NIXON MACHINERY & SUPPLY COMPANY, INC.

By R. A. NIXON
PRESIDENT

[fol. 216]

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

No. 6377

[Title omitted]

Transcript of Testimony—April 10, 1961

[fol. 217] Deposition of DONALD R. GAITHER, called as a witness at the instance of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Fuston:

Q. Will you state your name to the Court, please?
A. Donald R. Gaither.
Q. Mr. Gaither, Where do you live?
A. Chattanooga.
Q. And what is your address in Chattanooga?
A. 348 South Camp Jordon Road. That actually is not inside of the city, it's in the county.
Q. I understand. Now, what kind of work do you carry on, what is your business?
A. I am a CPA. Presently I am secretary of Lonas Construction Company, Incorporated.
Q. Secretary of Lonas Construction Company?
A. Yes, sir.
Q. How long have you been an official of the Lonas Construction Company?

A. Including its predecessor known as Oslo Construction Company, I have been an officer for approximately three years.

Q. Is the Lonas Construction Company a successor of the Oslo Construction Company?

A. It is.

Q. I notice on your mailing cards or sheets or stationery it has on one side "Lonas Construction" on the other side "Oslo Construction Company," is that so you can tie [fol. 218] the names in together?

A. I am not sure I know what you mean.

Q. In other words, do you not on your stationery put on one side "Lonas Construction Company" and also put on there "Oslo Construction Company"?

A. Not to my knowledge we don't.

Q. You haven't seen any like that, is that right?

A. I don't recall it if I have.

Q. All right, sir. Did the Lonas Construction Company purchase completely the Oslo Construction Company?

A. The Lonas Construction Company is the same corporation, merely a change actually in name which was effected approximately a year ago.

Q. Effective a year ago?

A. That's right.

Q. Do you know whether the job here in Cleveland, Tennessee, that involves the shopping center wherein you have a contract either with Jafco or Rea Construction Company, whether it's in the name of Oslo Construction Company or the Lonas Construction Company?

A. The original contract was with Oslo Construction Company, I believe. Now, later contracts that we have entered into have been in the name of Lonas Construction Company.

Q. But regardless of which name is used it would be all—

A. (Interposing) It would all be the same corporation.

Q. As of the present?

A. That's right.

Q. That would be the Lonas Construction Company?

A. That's correct.

Q. Now, Mr. Gaither, I believe that I asked you prior

[fol. 219] to this hearing if you would gather information to show what large machinery that your company purchased during the year of 1959 and 1960, is that correct?

A. You asked me if I would give you the approximate figures, as I recall it.

Q. Yes. Now, before we get into that, though, just what is the nature of the work that the Lonas Construction Company carries on?

A. We primarily deal in heavy machinery with dirt moving, excavation and paving. We do a little incidental work of other natures but that is our primary purpose.

Q. And you have home offices in Chattanooga, Tennessee?

A. Presently the home offices are here in Cleveland, they were moved about two months ago to Cleveland, the home office.

Q. All right, sir. Now, then can you give me or make a statement to the Court concerning the machinery that you purchased in 1959 and 1960? Have you looked over your books?

A. I can give you the approximate invoice prices.

Q. That is what I want to have at this time.

A. For the two years inclusive would run—

Q. (Interposing) I want a breakdown of each year.

A. A breakdown of each year?

Q. Yes.

A. For the year 1959 it would run approximately $100,000.00.

Q. One hundred thousand dollars?

A. Yes, sir.

Q. What about 1960?

[fol. 220] A. 1960 would run approximately $150,000.00. I would like to make one point of clarification here.

Q. Yes.

A. There was at one time two corporations involved in this which were consolidated and this one is the outgrowth and those figures would include both corporations.

Q. I see. Now, when you say $100,000.00 in 1959, what does that include?

A. You mean the type of machinery?

Q. What did you buy, yes.

A. Paving machine, I believe was one item which we purchased, we purchased some tractors, commonly called bulldozers, we purchased some automobiles, three of them, I believe it was, and then there were a number of minor pieces of equipment, smaller pieces of equipment running twelve to fifteen hundred dollars and less.

Q. What would be the type of machinery that cost the most of what you named?

A. Well, in that particular year I believe the asphalt paver possibly was the most expensive piece of equipment that we bought during that year.

Q. What would that cost approximately?

A. Approximately $18,000.00.

Q. What make was that, do you know?

A. Blaw-Knox.

Q. Is that Blaw-Knox Corporation of Kansas?

A. I don't know.

Q. You don't know where they are from?

A. No.

[fol. 221] Q. Where did you purchase it from?

A. Through Wilson-Weesner-Wilkinson Company.

Q. In Chattanooga?

A. Yes, sir.

Q. They have the Chattanooga agency for that type of machinery?

A. Yes.

Q. What about these bulldozers, how much do they run?

A. Usually, as I recall, the ones we bought were used machinery, which would run somewhere in the neighborhood of twelve or thirteen thousand dollars.

Q. Each?

A. Yes, sir.

Q. Do you know where these were purchased?

A. I believe they were all purchased through Wilson-Weesner. I hesitate to say definitely but I believe that's right.

Q. Were there any new ones purchased or were they all old ones?

A. Let's see now, I don't believe any new ones were, if they were the price on the new ones would have been

in excess of that amount. I don't believe there were any new ones purchased.

Q. All right. So much for 1959.

A. Wait just a moment. One other piece that I didn't include in there which is what we call a pull-pan.

Q. Pull-fan?

A. Pull-pan.

Q. Uh-huh.

[fol. 222] It's a LeTourneau Model C, I think they call that a Turna-Pull, is the trade name for it, that would run approximately somewhere between forty-five and fifty thousand dollars and I knew there was some more in there somewhere and I had forgotten. That was purchased through Nixon Machinery Company.

Q. In Chattanooga?

A. Yes, sir.

Q. Nixon Machinery Company. That's called a Turna-Pull Model C?

A. That's right.

Q. It's a pull-pan?

A. That's right.

Q. Was that purchased new?

A. Yes, sir.

Q. And what does a pull-pan do?

A. It's a machine which digs and hauls dirt, scrapes it up and hauls dirt and dumps it.

Q. Now, in 1960—first of all, let me ask you, would you want to revise your figures as far as 1959 is concerned? If that cost approximately forty-five to fifty thousand dollars and eighteen thousand dollars, these tractors twelve to thirteen thousand dollars—

A. (Interposing) I believe the hundred thousand dollars is near correct. Offhand I can only remember one tractor that we bought.

Q. I see. All right. Let's pass over to 1960. Then what were your biggest purchases in 1960?

A. We purchased another of those Turna-Pulls.

Q. Who did you get that from?

[fol. 223] A. From Nixon Machinery.

Q. From Nixon?

A. That's right.

Q. And how much did it cost?

A. Approximately $45,000.00.

Q. Forty-five thousand dollars.

A. Then we purchased a tractor. Excuse me.

Q. Did you purchase anything else from Nixon Machinery Company?

A. I don't recall anything except possibly some small machinery, such as air hammers or something of that nature.

Q. All right. Now, then what about 1960? Did you purchase anything else from Wilson-Weesner and whatever the name is?

A. Yes. We purchased another asphalt spreader, Blaw-Knox.

Q. Just a second, a spreader, Blaw-Knox.

A. It run, I believe it was $22,000.00, it's a larger spreader than the one purchased previously.

Q. Was that purchased new?

A. Yes, sir. We also purchased a tractor for them that was approximately $50,000.00.

Q. A tractor, what kind of a tractor?

A. Allis-Chalmers.

Q. Allis-Chalmers?

A. It's classified as a HD-21.

Q. HD-21?

A. That's right.

Q. The asphalt spreader, I understood was a Blaw-Knox?

[fol. 224] A. That's right.

Q. Was this tractor, Allis-Chalmers, a 1960 model? All these were 1960 models, I assume?

A. I assume they are. I don't know the particular year model it was.

Q. The Turna-Pull, is that the trade name? What is the manufacturer's name?

A. LeTourneau, I believe it's Letourneau-Westinghouse.

Q. How do you spell that?

A. (Spelling) L-e-t-o-u-r-n-e-a, I believe is the way it is spelled.

Q. And what other large items did you purchase in 1960?

A. Let's see, I gave you the Turna-Pull, the tractor and the spreader. We purchased four GMC tandem trucks.

Q. Four GMC tandem trucks?

A. Right. Those were purchased from Furlow-Cate or Hamilton Motors, I am not sure which one actually handled it, it was about the time Hamilton Motors was closing.

Q. How much roughly do they run?

A. We bought these used and we paid $7500.00 each for them.

Q. Seventy-five hundred dollars each?

A. That's right.

Q. They were new or used, you say?

A. Used.

Q. All right. Any other large new equipment?

A. We purchased a grader. I am trying to remember the date on it, I am sure it was in '60, it is an Adams 660 grader.

[fol. 225] Q. All right.

A. And I believe the price on that was around twenty-one or twenty-two thousand dollars.

Q. Who sold you that?

A. That was Nixon Machinery.

Q. Adams 66 grader?

A. Six hundred and sixty.

Q. Oh. Who makes that?

A. I believe that's made by LeTourneau-Westinghouse, but I am not sure.

Q. Without going any further into the other purchases, Mr. Gaither, do you know if any of these heavy equipment are made in the State of Tennessee?

A. I don't know where any of them are made.

Q. You don't know where any of them are made?

A. No, sir, I do not.

Q. You never have bothered to check into that?

A. No, sir.

Q. Would you have any objections to us contacting the Nixon Machinery Company or any of these other companies from whom you made purchases to obtain where the shipment was made of these large items?

A. No, I would have no objection.

Mr. Fuston: I will ask counsel if he has any objection.
Mr. Corn: No objections.
Mr. Fuston: All right.

By Mr. Fuston:

Q. Now, then, Mr. Gaither, I believe that you had a contract with some company to do the grading on this Jafco project, is that right, here in Cleveland?
[fol. 226] A. That's right.
Q. Who did you have your contract with?
A. It was with Jafco.
Q. With Jafco?
A. That's right.
Q. Did you have any contract with Rea Construction Company?
A. I don't recall any specific contract that we had with them. We are in the process of negotiating now but at the time that this incident happened I don't recall any actual contract. Now, we had done possibly some work for Rea Construction but not under a regular contract basis, it may be that they needed some little something done and they called on us to do it for them.
Q. Well, Rea Construction Company was the prime contractor on this project, I believe.
A. That's my understanding, I don't know for a fact.
Q. Were you over here at the time that the Lonas Construction Company began working Cleveland?
A. No, sir, I was in Chattanooga.
Q. You were in Chattanooga. And where did Rea Construction Company maintain its office, at the project or some place else in town at the time that construction began?
A. They were not there at the time our construction began.
Q. Well, I am talking about when they first did come in.
A. The only office I know of is where it is presently located.
[fol. 227] Q. Where is that?
A. In a trailer on the area.
Q. On the area there. And do you have an office in that same area?

A. No, sir.
Q. It's not there at all?
A. No.
Q. Are you familiar with the area?
A. Vaguely.
Q. Just vaguely?
A. Just vaguely, yes, sir. I know where it's located, I've been there, but I don't know just how much I could tell you about it.

Mr. Fuston: Just one moment. I believe that is all, Mr. Corn.
Mr. Corn: No questions.

Further This Deponent Saith Not.

Sworn to and signature waived before me this 10th day of April, 1961.

Richard Smith, Notary Public in and for Hamilton County and the State of Tennessee at Large. My Commission expires October 9, 1962.

[fol. 228] Deposition of GEORGE L. HENEGAR, a witness called at the instance of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Fuston:

Q. Will you state your name to the Court, please?
A. George L. Henegar.
Q. Mr. Henegar, where do you live?
A. I live at 507 South St. Marks, Chattanooga, Tennessee.
Q. And what do you do for a living?
A. Well, I am a carpenter by trade.
Q. I will ask you if you have an official position with any union?
A. I am assistant business agent for the Tri-State Carpenters District Council.
Q. Tri-State District Council. How many counties does that embrace?

A. Well, Mr. Fuston, it takes in—I believe I could name you the towns but you would rather have the counties?

Q. Does it include several counties around Chattanooga?

A. It does include about 14 counties, I'd say, in Tennessee.

Q. Does it also include Bradley County?

A. Yes, sir.

Q. I will ask you if you have any position with the Chattanooga Building Trades?

A. Yes, sir, I am Vice President of the Chattanooga Building Trades.

[fol. 229] Q. And I will ask you if you were familiar with a picket that was placed on the Jafco project in Cleveland in 1960?

A. Yes, sir.

Q. At that time, were you an official of the Chattanooga Building Trades?

A. Yes, sir.

Q. I will ask you if the Rea Construction Company was officially discussed in meetings of the Chattanooga Building Trades prior to work beginning on the project in Cleveland?

A. Yes.

Q. Would you explain to the Court in your own words how the J. A. Jones Construction Company and the Rea Construction Company work?

A. Well, the J. A. Jones Construction Company, any time that they have a job in our area they come in and have a pre-job conference with the Chattanooga Building Trades. We sit down and we talk about how the job will go and who will do the job, the superintendent, and so on, and their operation of the job and the difference in the two companies, as I see it, the Rea Construction Company is the non-union arm of J. A. Construction Company.

They didn't ask us or they didn't contact us in any way about the job.

Q. I believe that Mr. Dill, who was the witness for the Rea Construction Company, testified that the same monied interests, as he put it, controlled the Rea Construction Company and the Jones Construction Company, is the J. A. Jones Construction Company?

[fol. 230] A. J. A. Jones Construction Company.

Q. Is that your understanding also?

A. That's my understanding, yes, sir.

Q. Did you all check with Charlotte, North Carolina, and other places about Rea Construction Company before they began on this project?

A. Yes, sir.

Q. Were you ever contacted by the Rea Construction Company?

A. Not to my knowledge, no, sir.

Q. Did anybody in the Chattanooga Building Trades ever contact the Rea Construction Company when they began work?

A. Yes, sir, I am sure that they did.

Q. Well, do you know that of your own knowledge?

A. Well, I didn't contact them.

Q. All right.

A. I don't know.

Q. You don't know then?

A. I don't know, no, sir.

Q. Nothing officially reported back to the Chattanooga Building Trades about any conference?

A. No conference, no, not as far as I know.

Q. That's what I wanted to bring out. Now, what was the purpose of the Chattanooga Building Trades placing a picket on the Rea Construction Company at the job site?

A. Well, we have in the Chattanooga Building Trades approximately 10,000 people that belong to the Chattanooga Building Trades in this area, in the Chattanooga area which the Building Trades cover and the only way that we had [fol. 231] to let our people know that Rea Construction Company didn't use our people was to advertise it as being non-union.

Q. For that reason you put one picket on this whole project?

A. Yes, sir.

Q. And it advertised the fact that the Rea Construction Company was not under contract with the Chattanooga Building Trades?

A. That's right, yes, sir.

Mr. Fuston: I believe you can ask him.

Cross examination.

By Mr. Corn:

Q. Mr. Henegar, you stated, I believe in substance, that it was your idea that the Rea Construction Company is a sort of a non-union arm of the Jones Construction Company.

Do you have any records or documents to support that?

A. Only what we hear through our people from other parts of the country. We contact them and that is common knowledge.

Q. You have no records or anything like that to support your opinion on that?

A. No, sir, only my own opinion.

Q. Did your union post the picket on this job that is involved in this suit?

A. The Building Trades, yes, sir.

Q. How about you yourself?

A. No, sir.

Q. When did you first learn about his having been posted [fol. 232] here?

A. The picket?

Q. That's right.

A. Well, I knew about it when they was going to put the picket on there and I knew about it the day it was to be put on there.

Q. Was that matter discussed in a meeting of the Building Trades Council before the picket was put on?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. Were you there?

A. Yes, sir.

Q. And it was voted by the Building Trades Council to place the picket there?

A. Yes, sir.

Q. Do you know who actually placed him, which one of the union placed him?

A. No, sir, I don't know.

Q. Do you know which union he is a member of?

A. He is a member of the hod carriers, I am sure of that.
Q. Is the man's name Liner?
A. No, sir, I don't know the man's name.
Q. You don't know?
A. No, sir.
Q. You don't know him personally?
A. I don't know him personally, no, sir.

Mr. Fuston: We will stipulate what the man's name is.
[fol. 233] Mr. Corn: I think it's proved in the record.
Mr. Fuston: I think so, too.
Mr. Corn: That's all.

Further This Deponent Saith Not.

Sworn to and signature waived before me this 10th day of April, 1961.

Richard Smith, Notary Public in and for Hamilton County and the State of Tennessee at Large. My Commission expires October 9, 1962.

[fol. 247] [File endorsement omitted]

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

No. 6377

[Title omitted]

MEMO—May 31, 1961

Jafco, is a Tennessee Corporation having its only office and place of business located in the City of Cleveland, Bradley County, Tennessee.

Rea Construction Company, is a foreign Corporation licensed to do business in the State of Tennessee.

Jafco is the owner and in possession of land located within the corporate limits of the City of Cleveland, Bradley County, Tenn., on which it is presently erecting what is commonly referred to as a shopping center. It is estimated that this development will cost $2,000,000.00, or

more; and in order to make possible its erection and/or completion Jafco was required to enter into an agreement with its tenants that the various buildings under construction would be completed and ready for occupancy upon certain dates, the latest of which is September 1, 1961, and failing in this the tenants, respectively, have the right to cancel rental contracts heretofore made. This, the bill charges and the Court finds from the proof in support thereof, that time is of the essence in the performance of various contracts entered into, otherwise this large venture might well falter and fail if solemn agreements made in good faith are not carried out.

To erect this shopping center Jafco contracted with Rea Construction Co. Rea Construction Co., thereafter contracted with Lonas Construction Co., operators of heavy equipment, to grade the area required for this large shopping center.

[fol. 248] The parties were thus engaged in the pursuit of this program when on Monday, August 8, 1960, the defendant N. L. Liner appeared on the scene and started picketing the job, bearing a sign which read;

> "Rea construction Co., not under contract with Chattanooga Building Trades Council, A.F. of L."

The contractors had in their employ men who belonged to the union and those who did not.

Immediately upon establishing the picket line the union men, most of whom were engaged in the operation of the heavy equipment, walked off the job, the effect of which was to shut it down.

On the same day the picket line was established this bill was filed and upon fiat of this court, a temporary injunction issued enjoining picketing. N. L. Liner, a citizen and resident of Bradley County, who was engaged in picketing, Local 846 of the Hod Carriers and Common Laborers Union of America, an unincorporated Association or Labor Organization, having its principal office at 540 Vine Street, Chattanooga, Chattanooga Building Trades Council AFL, an unincorporated Association or Labor Organization, having its principal office and place of business at 540 Vine

Street, Chattanooga and Hod Carriers Building and Common Laborers Union of America, an International Union or unincorporated Association or Trade Union which is a non-resident of Tennessee, were named defendants.

The bill initially filed by Jafco, Inc., was later amended to include Rea Construction Co., as one of the complainants.

Defendants Local Union 846, Hod Carriers Building & Common Laborers Union of America an international organization filed separate demurrers challenging complainants' right to maintain the suit and specifically plead [fol. 249] (1) the Court is without jurisdiction of the subject matter, and (2) defendant's act of peaceful picketing is but a mere exercise of the right of free speech which is guaranteed both by the Federal and State constitutions.

There was a motion to dissolve the injunction which was heard by Chancellor H. J. Garrett who overruled the motion. He also overruled the demurrers and required the demurrants to answer with leave to rely upon the questions made by demurrers in the answers and at the hearing.

After the cause was at issue proof was taken; and on an adjourned day of the regular April term the cause was argued and subsequently briefs were filed by solicitors for the parties, respectively.

Defendants' principal contention involves the question of the Court's jurisdiction. Their able solicitors argue that the National Labor Relations Board has sole and exclusive jurisdiction because Interstate Commerce is involved here.

The Court is of opinion and, therefore, finds that the erection of the shopping center does not involve Interstate Commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to Interstate Commerce. But, if it did, there was no labor dispute.

The job was proceeding smoothly and without interruption until the Chattanooga Trades Council voted to place a picket on the job. Their excuse for this was simply to "advertise to the public when making future contracts that Rea was not under contract with Chattanooga Building Trades Council."

Now, with respect to the right of peaceful picketing and, as in this case by strangers or third parties, the insistence

made that it was the exercise of free speech and lawful is [fol. 250] far-fetched. The defendants involved here had no contract with complainants nor had they even attempted to negotiate one. The insistence that they were there to "advertise to the public" for future purposes is but a mere pretext for their real purpose which was to shut down this project and thus cause the breach of contracts previously negotiated and valid under the laws of Tennessee.

As late as December the Supreme Court of Tennessee in the case of Clyde Harrison Large v. Arlin Dick, et al., 343 SW 2d 693, held:

> "That every man has the right of property in his own labor, and the right to work without interference; and whoever intentionally interferes with this right is liable in tort for the damage caused, unless he can show a privilege or justification for such interference."

In this case the Court has found no privilege or justification for defendants' intentional interference with complainants and their employees' right to negotiate and execute contracts, breach of which would result in irreparable damages to complainant, Jafco.

In conclusion it will be observed that defendants have been free at all times to apply to the National Labor Relations Board for relief had they thought this Board had jurisdiction. Their failure to seek such relief leaves but one obvious conclusion, that the Board was without jurisdiction.

Thus, the bill will be sustained and the injunction heretofore issued will be made perpetual.

The defendants will have 30 days in which to perfect their appeal.

So Decreed.

This May 31, 1961.

G. W. Woodlee, Chancellor.

[fol. 251] [File endorsement omitted]

IN THE CHANCERY COURT, BRADLEY COUNTY

CLEVELAND, TENNESSEE

No. 6377

[Title omitted]

FINAL DECREE—Filed June 15, 1961 and entered June 16, 1961

This cause came on to be heard before the Honorable Glenn W. Woodlee, Chancellor, holding the Chancery Court for Bradley County at Cleveland, Tennessee, upon the Bill for Injunction as amended, the answers of all the defendants, the deposition and stipulation of the parties, the briefs of the respective parties, the oral argument of the solicitors in this cause, and the entire record, from all of which it appears that the complainants are entitled to an injunction as sought by reason of the findings and conclusions of law set forth in the Chancellor's memorandum heretofore filed on the second day of June 1961, which said memorandum is incorporated herein by reference in its entirety, it is therefore

Ordered, Adjudged and Decreed by the Court that the injunction heretofore granted in this cause prohibiting and restraining the defendants and all their pickets, strikers and sympathizers from picketing the Jafco, Inc., shopping center site in Cleveland, Tennessee or in any other manner interfering with the performance of said job is hereby continued and made perpetual.

The costs are taxed against the defendants for which execution may issue.

To all of which Decree and all previous orders of the Court the defendants duly except and pray an appeal to the [fol. 252] Court of Appeals sitting at Knoxville, Tennessee, which is hereby granted upon the execution of an appeal

bond and otherwise perfecting the appeal in the manner provided by law.

This 16th day of June, 1961.

G. W. Woodlee, Chancellor.

Approved:

Jac Chambliss, James F. Corn.
King & Fuston.

[fol. 254] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 260]

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION, AT KNOXVILLE

No. 1

Bradley County Equity Docket

JAFCO, INC., et al.

vs.

N. L. LINER, et al.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT OF APPELLANTS—Filed June 22, 1961

* * * * * * *

[fol. 263]

Assignment of Errors

I

The Chancellor erred in ordering, adjudging and decreeing that a temporary injunction issue prohibiting the defendants and all the pickets, strikers and sympathizers from picketing the Jafco, Inc. shopping center site in Cleveland, Tennessee, or in any other manner interfering with the performance of said job, TRP 9; by failure to dissolve

the injunction at the hearing on the Motion to Dismiss, TRP 38, and by making said injunction permanent in the Final Decision, TRP 251.

The Court in rendering the injunction necessarily had to take jurisdiction of the subject matter.

The Bill of Complaint as amended alleges conduct that is prohibited by Sec. 8(b)(4)(i)(ii) of the National Labor Relations Act as amended in 1959 (29 USC 158). The appellants contend that the conduct is protected by Section 7 of the National Labor Relations Act. The conclusion that can be drawn is that the conduct is either protected or prohibited. In either event a controversy is present that can only be resolved by the National Labor Relations Board.

Congress has preempted jurisdiction in the subject matter in the National Labor Relations Board.

San Diego Building Trades Council vs *Garmon*, 359 US 236-79 S. Ct. 773, April 20, 1959

In the Garman case the Supreme Court held that the complaining party must go to the National Labor Relations Board if the conduct arguably falls within the protection of the National Labor Relations Act, Section 7, or is prohibited conduct set forth in Section 8. For a list of authorities see

Wagner vs *Hartnitt*, Sel. Sup. Court, July 16, 1959, 153 A 2d 584, 44 LRRM 2980

[fol. 264] *Piedmont Shirt Co.* vs *Amalgamated Clothing Wkrs.*, July 18, 1960, Sup. Ct. of S. C., 115 SE 2d 499, 46 LRRM 2743

Dempsey vs *Great Atl. & Pac. Tea Co.*, Nov. 22, 1960, 208 NYS 2d 18 (NY Sup. Ct.)

II

The Court erred in ordering, adjudging and decreeing that only intrastate commerce was involved in this cause. Opinion, TRP 249, and incorporated in Final Decree, TRP 251.

The power of Congress to regulate interstate commerce is plenary and extends to all commerce, be it great or small.

See *Labor Board* vs *Faiblatt*, 306 US 601

In 1959 Congress froze the National Labor Relations Board's jurisdictional standards that were in effect. 29 USC 164.

The Board's jurisdictional standards require showing that a non-retail employer has an annual inflow or outflow of goods and services from and to persons outside the state amounting to only $50,000.00.

See letter from NLRB, TRP 213, listing:

Seimons Mailing Service, 43 NLRB 1056, 122 NLRB 13

The Board will also consider the operation of the secondary employers involved.

McAllester Trans. Co., 35 LRRM 1281

The only testimony of the prime contractor, Rea Construction Company, was by its chief official of the construction job, Fritz Diehl. He testified that in the first ten months of operation this company purchased $147,096.67 [fol. 265] in materials from outside the State of Tennessee. See Exhibit I, Diehl's testimony, TRP 156.

The secondary employer, Lonas Construction Company, was also engaged in interstate commerce within the meaning of the Act. See testimony of Donald R. Gaither, TRP 223-225, wherein he testified as to the amount of machinery purchased from the Nixon Machinery & Supply Company, and the stipulation as to where the machines were purchased by the Nixon Company, TRP 215.

III

The Chancellor erred in ordering, adjudging and decreeing that there was no labor dispute, Opinion of the Court, TRP 249, incorporated in Final Decree, TRP 251.

This is a matter for the National Labor Relations Board to interpret since the case arguably should be before the National Labor Relations Board.

The definition of a "Labor Dispute" as defined by the National Labor Relations Act includes any controversy

regardless of how the disputants stand in the approximate relation of employer and employee, 29 USCA 152. See

Am. Fed. of Labor vs *Swing*, 312 US 321

And the same definition followed by the Supreme Court of Tennessee in

Watson vs *Wilson*, 187 Tenn. 402, 215 SW 2d 801

Said cases hold that peaceful picketing is lawful without the presence of a labor dispute.

[fol. 266]

IV

The Court erred in ordering, adjudging and decreeing an injunction against peaceful picketing under state laws as the injunction is in violation of the 14th Amendment of the Constitution of the United States. See *Watson* vs *Wilson*, 187 Tenn. 402, 215 SW 2d 801.

V

The Chancellor erred in ordering, adjudging and decreeing that the Demurrer of the Hodcarriers Local 846 and the International Hodcarriers Union be overruled, TRP 38-41, and in its failure to dismiss said parties in the Final Decree, TRP 251.

There are no facts in the complaint as amended showing that Local 846 participated in the picketing other than as a member of the Chattanooga Building Trades.

There are no facts involving the International Union, and the International is not responsible for the acts of its Local.

Coronado Co. vs *U. Mine Wkrs.*, 268 US 295;
U. Mine Wkrs. vs *Coronado Co.*, 259 US 344, 393

VI

The Chancellor erred in ordering, adjudging and decreeing that the defendants should pay the Court costs. See authorities cited in the Assignment of Error No. I above.

[fol. 296] [File endorsement omitted]

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

Bradley Equity

Hon. Glenn W. Woodlee, Chancellor

JAFCO, INC., et al.,

vs.

N. L. LINER, et al.

For complainants-appellees, Jac Chambliss, Chattanooga and Jas. F. Corn, Cleveland, Tenn.

For defendants-appellants, King & Fuston, Chattanooga, Tenn.

OPINION—Filed January 12, 1962

HALE, J.

The issues in this case submitted to the Chancellor are fully set forth in his memorandum opinion, viz.,

> "Jafco, is a Tennessee Corporation having its only office and place of business located in the City of Cleveland, Bradley County, Tennessee.
>
> "Rea Construction Company, is a foreign Corporation licensed to do business in the State of Tennessee.
>
> "Jafco is the owner and in possession of land located within the corporate limits of the City of Cleveland, Bradley County, Tenn., on which it is presently [fol. 297] erecting what is commonly referred to as a shopping center. It is estimated that this development will cost $2,000,000.00, or more; and in order to make possible its erection and/or completion Jafco was required to enter into an agreement with its tenants that the various buildings under construction would be com-

pleted and ready for occupancy upon certain dates, the latest of which is September 1, 1961, and failing in this the tenants, respectively, have the right to cancel rental contracts heretofore made. This, the bill charges and the Court finds from the proof in support thereof, that time is of the essence in the performance of various contracts entered into, otherwise this large venture might well falter and fail if solemn agreements made in good faith are not carried out.

"To erect this shopping center Jafco contracted with Rea Construction Co. Rea Construction Co., thereafter contracted with Lonas Construction Co., operators of heavy equipment, to grade the area required for this large shopping center.

"The parties were thus engaged in the pursuit of this program when on Monday, August 8, 1960, the defendant N. L. Liner appeared on the scene and started picketing the job, bearing a sign which read:

[fol. 298] " 'Rea Construction Co., not under contract with Chattanooga Building Trades Council, A. F. of L.' "

"The contractors had in their employ men who belonged to the union and those who did not.

"Immediately upon establishing the picket line the union men, most of whom were engaged in the operation of the heavy equipment, walked off the job, the effect of which was to shut it down.

"On the same day the picket line was established this bill was filed and upon fiat of this court, a temporary injunction issued enjoining picketing. N. L. Liner, a citizen and resident of Bradley County, who was engaged in picketing, Local 846 of the Hod Carriers and Common Laborers Union of America, an unincorporated Association or Labor Organization, having its principal office at 540 Vine Street, Chattanooga, Chattanooga Building Trades Council AFL, an unincorporated Association or Labor Organization, having its principal office and place of business at 540 Vine Street, Chattanooga and Hod Carriers Building and Common Laborers Union of America, an International Union or unincorporated Association or Trade Union which is

a non-resident of Tennessee, were named defendants.

"The bill initially filed by Jafco, Inc., was later amended to include Rea Construction Co., as one of the complainants.

[fol. 299] "Defendants Local Union 846, Hod Carriers Building & Common Laborers Union of America an international organization filed separate demurrers challenging complainants' right to maintain the suit and specifically plead (1) the Court is without jurisdiction of the subject matter, and (2) defendant's act of peaceful picketing is but a mere exercise of the right of free speech which is guaranteed both by the Federal and State constitutions.

"There was a motion to dissolve the injunction which was heard by Chancellor H. J. Garrett who overruled the motion. He also overruled the demurrers and required the demurrants to answer with leave to rely upon the questions made by demurrers in the answers and at the hearing.

"After the cause was at issue proof was taken; and on an adjourned day of the regular April term the cause was argued and subsequently briefs were filed by solicitors for the parties, respectively.

"Defendants' principal contention involves the question of the Court's jurisdiction. Their able solicitors argue that the National Labor Relations Board has sole and exclusive jurisdiction because Interstate Commerce is involved here.

"The Court is of opinion and, therefore, finds that the erection of the shopping center does not involve Interstate Commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to Interstate Commerce. But, if it did, there was no labor dispute.

[fol. 300] "The job was proceeding smoothly and without interruption until the Chattanooga Trades Council voted to place a picket on the job. Their excuse for this was simply to 'advertise to the public when making future contracts that Rea was not under contract with Chattanooga Building Trades Council.'"

"Now, with respect to the right of peaceful picketing and, as in this case by strangers or third parties, the insistence made that it was the exercise of free speech and lawful is far-fetched. The defendants involved here had no contract with complainants nor had they even attempted to negotiate one. The insistence that they were there to 'advertise to the public' for future purposes is but a mere pretext for their real purpose which was to shut down this project and thus cause the breach of contracts previously negotiated and valid under the laws of Tennessee.

"As late as December the Supreme Court of Tennessee in the case of Clyde Harrison Large v. Arlin Dick, et al., 343 SW 2d 693, held:

> "'That every man has the right of property in his own labor, and the right to work without interference; and whoever intentionally interferes with this right is liable in tort for the damage caused, unless he can show a privilege or justification for such interference.'"

"In this case the Court has found no privilege or justification for defendants' intentional interference [fol. 301] with complainants and their employees' right to negotiate and execute contracts, breach of which would result in irreparable damages to complainant, Jafco.

"In conclusion it will be observed that defendants have been free at all times to apply to the National Labor Relations Board for relief had they thought this Board had jurisdiction. Their failure to seek such relief leaves but one obvious conclusion, that the Board is without jurisdiction.

"Thus, the bill will be sustained and the injunction heretofore issued will be made perpetual."

Decree was entered accordingly, from which the defendants duly prayed, were granted and have perfected this appeal. There are several assignments of error. All must be overruled.

In the first place the questions in this case have become moot. The appellants in brief filed June 22nd, 1961, in which they were seeking to advance the cause for hearing, stated:

> "In the instant case, the right of picketing will become moot by August 1, 1961, as the construction will be completed and the building ready for occupancy. Appellants know that they desire to picket one of the complainants, Rea Construction Company, this coming fall on a project which will require approximately six or eight months of construction. Without judicial review of this case they can only expect the same Trial Court to act the same, and again they cannot possibly get the case to the appellate court for a decision within that time."

We have too much work to do to prevent us from attempting to render advisory opinions in future litigation that may or may not arise.

[fol. 302] In Malone v. Peay, 157 Tenn. 429, there was involved an attempt to obtain an injunction to prevent the purchase of lands for the Smoky Mountain Park. It was denied by the trial court. Complainants appealed and on that appeal the Supreme Court, speaking through Mr. Chief Justice Green, said:

> "At the bar of this court, it was conceded that the purchase of the lands, sought to be enjoined, had been consummated. Such being the fact, the bill presents only a moot case, insofar as it seeks an injunction. An injunction would accomplish nothing now, and the bill in this aspect cannot be maintained."

The same principle applies to suits under the Ouster Law. In State ex rel. v. Hassler, 196 Tenn. 158, the relators had unsuccessfully sought to oust a County School Superintendent, and then appealed to the Supreme Court. Pending the appeal the defendant's term expired and he was duly elected to succeed himself. It was held that the appeal could not be entertained, and was dismissed at the cost of appellants.

Further, we concur with the Chancellor's finding that a bona fide labor dispute did not exist. Defendants never at any time sought to obtain a contract from the Rea Construction Company which had a policy of employing union and non-union personnel without discrimination.

Defendants say that when they placed this picket on the line it was merely for education. We cannot accept that explanation which doesn't explain. They knew that when this picket was placed at this entrance to the work that it would result in union employees refusing to cross the line, and this is exactly what happened, thus causing a complete work stoppage. In short, we find that the action of the defendants was spiteful and malicious in an attempt to injure both Jafco, Inc., and the Rea Construction Company.

[fol. 303] What has been said requires the affirmance of the decree below, with cost against the appellants and surety on appeal bond.

Affirmed.

Hale, J.

Concur: McAmis, P.J., Cooper, J.

[fol. 304] [File endorsement omitted]

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

May Term 1961

Tuesday, January 16th, 1962

Court met pursuant to adjournment present and presiding the Honorable Judges Luke M. McAmis, Winfield B. Hale and R. E. Cooper.

The minutes of yesterday were read and signed when the following proceedings were had to-wit:

Bradley Equity

Affirmed

[Title omitted]

JUDGMENT—Filed January 12, 1962

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Bradley County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error,

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the costs of the cause will be paid by N. L. Liner, Local 846, Hod-Carriers Union, Chattanooga Building Trades, AFL, Hod-Carriers Bldg., Common Laborers Union of America, et al. and surety Fidelity and Deposit Company of Maryland, for which let execution issue.

[fol. 309] [File endorsement omitted]

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

Bradley Equity

JAFCO, INC., et al.,

vs.

N. L. LINER, et al.

PETITION OF N. L. LINER, CHATTANOOGA BUILDING TRADES COUNCIL, AND ALL OTHER ORIGINAL DEFENDANTS—Filed March 26, 1962

May it please Your Honors:

Your petitioners, N. L. Liner and all other original defendants in the Chancery Court, respectfully represent:

I

That they were and are very much aggrieved by the opinion and judgment rendered against them by the Honorable Court of Appeals for the Eastern Section of Tennessee at Knoxville, Tennessee, on the 12th day of January, 1962.

II

The principal question raised by the pleadings and proof is whether or not the state can regulate peaceful picketing when interstate commerce is established.

III

The substance of the case is as follows:

The parties will be referred to as complainants or defendants as they were in the original case.

[fol. 310] The undisputed proof, as well as the Bill of Complaint, is that Jafco, Inc. is a corporation, building a huge, sprawling shopping center in Cleveland, Tennessee, to cost over two million dollars. Rea Construction Company is the prime building contractor. The latter company is a foreign corporation, but authorized to do business in the State of Tennessee. Rea Construction Company has its principal office in North Carolina, but has a permanent branch office in Atlanta, Georgia. One of the many subcontractors is Lonas Construction Company.

After construction began members of one of the defendant unions made complaint to their officials that the rate of pay was less than the prevailing union rate in Bradley County. Complainant, Rea Construction Company, has a history of refusing to enter into any type of union contract. On August 8, 1960, defendant, N. L. Liner, appeared on the scene of the construction with a picket sign which stated:

> "Rea Construction Company not under contract with Chattanooga Building Trades Council, AFL."

There is no complaint that the above banner misstates the facts or is misleading. There is no complaint of violence, mass picketing or such. Complainants conclude from

mere picketing that the purpose of the picketing is to force the breach of the contracts between Jafco, Inc. and Rea Construction Company, or Rea Construction Company and Lonas Construction Company, which would be unlawful under TCA, Sec. 47-1706. Complainants further charge that there would be a violation of the Right-To-Work Laws, TCA, Sec. 50-208 and 50-209. See Amended Bill of Complaint, TRP 13.

Defendants contend that their purpose is to advertise; to let the public know in Cleveland and vicinity that the Rea Construction Company is not under union contract. The effect that is sought is that persons who hire contractors will know which are union contractors. It is the hope of organized labor that the public, once informed, will hire [fol. 311] contractors who agree to contracts protecting the employees as to wages, hours and working conditions. The purpose of the defendants is similar to that set out hereinafter in the case of *Radio Broadcast Technicians Union.* See Answer of defendants, TRP 29.

Defendants alleged that the conduct of which complaint was made is regulated by Federal Law, but is permissible under either State or Federal Law.

IV

Petitioners aver that the Decree of the Court of Appeals affirming the decree of the Chancery Court is erroneous in every respect. In the first place the Court of Appeals says it is too busy to render an advisory opinion, then it renders one. In what appears to be haste on the part of the Court it completely ignores the National Labor Relations Act as amended as interpreted by the various appellate courts, including the U. S. Supreme Court. The Court of Appeals says the case is moot and relies on a statement from the petition to advance the case for hearing. The statement was correctly made at the time. The defendants obviously relied on the completion dates of construction set forth in the contracts which complainants had offered into evidence. The work, due to material changes in construction or design, weather conditions, or other conditions (but certainly not a labor dispute) was

still in full progress at the time of hearing in the Court of Appeals, and even counsel for complainants, upon inquiry from the Court stated it would be weeks before construction was completed. To hold the case moot, and without considering the question of justice of the subject matter terminates the right of the petitioners for their costs, expenses and damages for the wrongful issuance of the injunction.

The Honorable Court of Appeals fails to take into consideration the fact that if the Court was without jurisdiction of the subject matter that its only order could be one of dismissal, with costs against complainants.

[fol. 312] The Court holds there was no labor dispute, without assigning any reason. A protest against substandard or non-union wages and the succeeding advertisement that a contractor is not under contract is the most typical of all labor disputes..

The Court of Appeals, in effect, holds that peaceful picketing standing alone and nothing more appearing is spiteful and malicious. There is not a scintilla of evidence to support the finding and the holding is contrary to law.

The Court of Appeals completely ignores the separate defense of the defendant International Hod Carriers, Building and Common Laborers Union of America. There were no facts involving this party whatever and it should have been dismissed from the action.

The various assignments of errors, based upon the foregoing statements, appear more fully in the assignment of errors and brief hereto attached and made a part hereof.

V

Petitioners, more than five (5) days ago, had notice served on the defendants, original complainants, that they would present this petition here and now, and their waiver of said notice appears on the page preceding this petition.

VI

Petitioners aver that the aforesaid opinion and decree is unjust and that it should be revised and corrected, and

that the judgment of the Court of Appeals should be reversed, and that justice be done to petitioners.

Premises Considered, Petitioners Pray:

That a Writ of Certiorari issue to the Court of Appeals requiring that court to certify to Your Honors the record [fol. 313] in that case to the end and that same be examined and corrected in the particulars herein complained of and that general relief be afforded petitioners.

This Is the First Application for Writ of Certiorari in This Cause.

N. L. Liner, Local 846 of the Hod Carriers, Building & Common Laborers Union of America; Hod-Carriers Building & Common Laborers Union of America, Petitioners, By S. D. Fuston, King & Fuston, Solicitors for Petitioners, 723 Chattanooga Bank Bldg., Chattanooga, Tennessee.

State of Tennessee, County of Hamilton:

S. D. Fuston makes oath before the undersigned that he is one of the attorneys of petitioners and that he is familiar with the facts and statements contained in the foregoing petition, and that the statements therein are true to the best of his knowledge, information and belief.

S. D. Fuston.

Sworn to and subscribed before me, this 16th day of March, 1962.

Nixala Ziegler, Notary Public. My Commission Expires 10-16-65.

(Seal)

State of Tennessee, County of Hamilton:

Raymond Floyd makes oath before the undersigned that he is the President and Chief Official of Local 846 of the Hod-Carriers Building & Common Laborers Union of America; that he is familiar with the facts and statements

contained in the foregoing petition, and that the statements therein are true to the best of his knowledge, information and belief.

Raymond Floyd.

Sworn to and subscribed before me, this 16th day of March, 1962.

Nixala Ziegler, Notary Public. My Commission Expires 10-16-65.

(Seal)

[fol. 314]

PETITIONERS' ASSIGNMENT OF ERRORS TO THE JUDGMENT OF THE COURT OF APPEALS

Error No. 1

It was error for the Court of Appeals to hold that the questions involved herein had become moot.

The Court of Appeals based its information upon certain statements appearing in a petition of the original defendants wherein they attempted to advance the cause for hearing. The Court of Appeals refused to advance the cause for hearing and upon the hearing counsel for the respective parties announced that it would be several weeks before the construction would be completed.

Error No. 2

It was error for the Court of Appeals to hold that the questions in this cause had become moot when the court was without jurisdiction of the subject matter. The only order of the Court, if it was without jurisdiction, would be an order dismissing the cause and taxing the costs to the original complainants. The action of the Court deprives the original defendants from future picketing and it prevents them from recovering the costs, expenses and damages by the wrongful issuance of the injunction which was made permanent.

Error No. 3

It was error for the Court of Appeals to hold that it was too busy to render an advisory opinion, and then render an advisory opinion.

Error No. 4

It was error for the Court of Appeals, in its opinion, to completely ignore the National Labor Relations Act as amended.

Error No. 5

It was error for the Court of Appeals to affirm the decree of the Chancery Court which held that only intrastate com- [fol. 315] merce was involved. The Court of Appeals failed to take into consideration that it was merely incumbent on the parties to show *arguably* that interstate commerce was involved.

Error No. 6

It was error for the Court of Appeals to hold that there was no bona fide labor dispute. The labor dispute involved in this cause is that most typical in the construction industry.

Error No. 7

It was error for the Court of Appeals to hold that the action of the defendants was spiteful and malicious. There is no evidence whatever to support this finding and holding.

Error No. 8

It was error for the Court of Appeals to fail to consider and to hold that it was without jurisdiction of the subject matter. The opinion of the Trial Court is adopted verbatim by the Court of Appeals. Said opinion fails to consider the National Labor Relations Act as amended, or decisions by the Supreme Court of Tennessee and the Supreme Court of the United States.

Error No. 9

It was error for the Court of Appeals to fail to dismiss the International Hod Carriers Building & Common Laborers Union of America from the cause. The Court of Appeals completely ignores the 5th Assignment of Error which had been properly presented to it.

Error No. 10

It was error for the Court of Appeals to tax the costs against the original defendants. The only order permissible where the Court is without jurisdiction of the subject matter is to dismiss the bill and tax the costs against complainants.

[fol. 316]

The Issues

I

The first three and the last assignment of errors raise the question: Is This Case So Moot That There Is Nothing Remaining Whereby the Court Can Render a Decision?

II

All other assignment of errors, with the exception of Error No. 9 raise the question: Do the State Courts Have Jurisdiction of a Case Wherein the Conduct of Which Complaint Is Made Arguably Should Be Before the National Labor Relations Board?

III

Assignment of error No. 9 raises the question: Is an International Union Bound by the Acts of the Agents and Representatives of a Local Union?

[fol. 346] [File endorsement omitted]

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

September Term 1961

— Bradley Equity

Writ Denied

[Title omitted]

ORDER DENYING PETITION FOR CERTIORARI—
Filed September 28, 1962

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Bradley County, opinion and decree of the Court of Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition for certiorari is denied.

The petitioners N. L. Liner, et al. and surety Fidelity and Deposit Co. of Maryland will pay the costs incident to filing petition for certiorari, for which let execution issue.

Alan M. Prewitt, Mellon B. White, Hamilton S. Burnett.

[fol. 349] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 350]

SUPREME COURT OF THE UNITED STATES

No. 628, October Term, 1962

N. L. LINER, et al., Petitioners,

vs.

JAPCO, INC., et al.

ORDER ALLOWING CERTIORARI—January 14, 1963

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Tennessee is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 30 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. [redacted] 43

N. L. LINER et al.,
Petitioners,

vs.

JAFCO, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee,
Eastern Section.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

N. L. LINER et al.,
Petitioners,

vs.

JAFCO, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee, Eastern Section.

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Tennessee, Eastern Section, entered in the above case on January 12, 1962.

OPINIONS BELOW.

The opinion rendered by the Court of Appeals of Tennessee, Eastern Section, on January 12, 1962, is printed in Appendix A hereto at pages 19-26.

A petition for certiorari to the Supreme Court of Tennessee was denied without opinion by the Supreme Court of Tennessee on September 28, 1962 (R. 346).

JURISDICTION.

The jurisdiction of this Court rests upon 28 U. S. C., Sec. 1257 (3). Petitioners, labor unions and their members, have been enjoined by a state court in Tennessee which lacks jurisdiction inasmuch as the comprehensive Federal Labor Management Relations Act of 1947 has preempted this field of regulation and closed it to parallel state action.

The denial of certiorari by the Supreme Court of Tennessee made effective the decision of the Court of Appeals of Tennessee as the final judgment rendered by the highest court of Tennessee in which a decision could be had.

QUESTION PRESENTED.

Do the Tennessee Courts have jurisdiction to enjoin peaceful picketing by unions, protesting working conditions or work practices of an employer, when the contention is made by the employer that there is no "labor dispute" or "interstate commerce" involved and state laws prevail, but the evidence shows that the dispute and commerce involved were arguably within the meaning of the Labor Management Relations Act and the commerce involved meets the standards set by the National Labor Relations Board, and the matters in dispute had never been presented to the National Labor Relations Board for determination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is found in the Constitution of the United States, Article VI, second sentence, as follows:

"This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

Pertinent statutory provisions which are printed in Appendix B, infra, p. 27 ff., are as follows: Pertinent portions of the Labor Management Relations Act of 1947, viz: 29 U. S. C., Sec. 152 (7) and (9), 61 Stat. 137; 29 U. S. C., Sec. 157, 61 Stat. 140; 29 U. S. C., Sec. 158 (b) (4), 73 Stat. 525, 542, 545; Tennessee Statutes relating to declaratory judgments, Secs. 23-1102, 23-1103; and Tennessee Statutes relating to breach of contracts, Sec. 47-1706, and right-to-work laws, Secs. 50-208 and 50-209.

STATEMENT OF THE CASE.

Petitioners, Chattanooga Building Trades Council AFL, Local 846 of the Hod-Carriers, Building and Common Laborers Union of America, and its International, Hod-Carriers, Building and Common Laborers Union of America are labor organizations and their individual officers and members affiliated with the AFL-CIO. Respondent, Jafco, Inc., is a company engaged in building a large shopping center within the City of Cleveland, Tennessee. Respondent Rea Construction Company, the prime contractor, is a corporation engaged in general building contractual work in several states. Substantial interstate shipments of materials purchased outside the state of Tennessee were required for this project. Rea Construction Company was a non-retail employer who had an annual inflow and outflow of goods and services from or to persons outside the state several times over the jurisdictional yardstick of $50,000.00 as set by the National

Labor Relations Board. The question of interstate commerce is hereinafter discussed on pages 11-14. The complaint alleged that the respondents were building a shopping center to cost in the neighborhood of two million dollars and when completed there would be many tenants (R. 1). Respondents and petitioners became embroiled in a labor dispute by reason of the following facts:

The stockholders of the Rea Construction Company also own, or have substantial interests in another construction company, J. H. Jones Construction Company, and both of these companies have home offices located in Charlotte, North Carolina. Petitioners introduced testimony to show that the respondent, Rea Construction Company, operates under the lowest possible working conditions while its sister-corporation, Jones Construction Company, works under union contracts, pays the prevailing wage scales, and otherwise complies with area working conditions (R. 175, 228-230).

It was argued to the Court that the purpose of having two separate companies operating as aforesaid was to circumvent the NLRA by having the Jones Construction Company to work in areas where there was at least some union support and the courts would permit informational picketing of a company like Rea Construction Company. On the other hand, the Rea Construction Company worked in areas wherein it could underbid competitors due to its lower wage scales and working conditions and where the company hoped to obtain a state court injunction against all picketing (R. 208).

Soon after the construction work began one of the Chattanooga Hod-Carriers' business representatives stopped at the job site and the colored laborers explained the low rate of pay they were receiving and asked their union representative if something could be done (R. 161). The

Chattanooga Building Trades had already considered the placing of a picket at the job site (R. 175).

On August 8, 1960, respondent N. L. Liner, a member of the local Hod-Carriers' Union appeared on the scene of the construction with a picket sign which stated as follows:

> "Rea Construction Company not under contract with Chattanooga Building Trades Council, AFL" (R. 2, 80).

There was no complaint that the picket banner misstated the facts or was misleading. There was no complaint of violence, mass picketing or such. The respondents concluded from mere picketing that the purpose of the picketing was to force a breach of the contracts between the respondents and their subcontractors which would be unlawful under Tennessee laws.

The bill of complaint alleged that petitioners were engaged in unlawful conduct in attempting to cause breaches of contracts which would be unlawful under the Tennessee Code Annotated, Sections 47-1706, 50-208 and 50-209, Appendix B, pages 29-30 (R. 13-21). Within a matter of minutes petitioners were stopped from peaceful picketing by an ex parte injunction issued by a state court.

It was the contention of the petitioners that they had the right to establish a single picket to advertise the truth and permit the public in Cleveland and vicinity to know of the dispute. The position of the petitioners was and is that the picketing was protected under Section 7 of the Act, but assuming that respondents' contention was true, the activity was clearly covered by Section 8 (b) (4) (i) (ii) of the Act. In either event a controversy was presented that could be resolved only by the National Labor Relations Board.

HOW FEDERAL QUESTION IS PRESENTED.

Petitioners filed an answer denying the jurisdiction of the Chancery Court, reprinted at Appendix D, pages 40-47, alleging that the subject matter of the suit was governed by the federal statutes cited herein, that the National Labor Relations Board had exclusive jurisdiction and the state court had no jurisdiction of the subject matter (R. 29-35). A motion to dissolve the injunction and dismiss the bill of complaint for lack of jurisdiction was filed (R. 28), and upon the hearing of the motion the temporary injunction was continued to the final hearing, Appendix C, pages 31-33 (R. 38-41). The case was thereupon heard on the entire record, including the motion to dismiss for want of jurisdiction. The temporary injunction was made permanent which specifically enjoined and restrained petitioners and all their pickets, strikers and sympathizers from picketing the aforesaid job site in any manner and in any manner interfering with performance of said job (R. 247-252). The final Memorandum and Order of the Trial Court are reprinted at Appendix C, pages 35-39.

The petitioners thereafter appealed to the Court of Appeals of Tennessee, Eastern Section, at Knoxville, Tennessee, asserting, among other things (R. 258-288), that the Chancery Court had no jurisdiction of the subject matter of the suit and that exclusive jurisdiction was in the federal agency. The Assignment of Errors and questions presented to the Court of Appeals are reprinted at Appendix D, pages 48-53 (R. 263-267). The Court of Appeals upheld and affirmed the decree of the Trial Court, holding that only intrastate commerce was involved, that there was no labor dispute, and that petitioners had violated state laws. The Court of Appeals, as well as the Trial Court, did not cite or refer to any federal laws or decisions which were controlling.

The Court of Appeals, in its decision, quoted verbatim the decision of the Trial Court in which the following statement was made:

> "Defendants' principal contention involves the question of the Court's jurisdiction. Their able solicitors argued that the National Labor Relations Board has sole and exclusive jurisdiction because interstate commerce is involved here.
>
> "The Court is of opinion and therefore finds that the erection of a shopping center does not involve interstate commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to interstate commerce. But, if it did, there was no labor dispute." Appendix A, page 22.

The federal questions, having been completely ignored by the Trial Court and the Court of Appeals, were next presented to the Supreme Court of Tennessee by timely petition for writ of certiorari (R. 316), which contained assignment of errors challenging the jurisdiction and power of the state courts and specifically presented the following question:

> "Do the state courts have jurisdiction of a case wherein the conduct of which complaint is made arguably should be before the National Labor Relations Board?"

As above indicated, the Supreme Court of Tennessee, on the 28th day of September, 1962, denied the petition without opinion (R. 346).

REASONS FOR GRANTING THE WRIT.

The judgment below is in direct conflict with this Court's Opinions in the cases of **San Diego Building Trades Council v. Gorman, 359 U. S. 236,** and **Engineers Ass'n v. Interlake Steamship Company, ... U. S. ..., 8 L. Ed. 410.**

The Tennessee courts have encroached upon the exclusive jurisdiction of the National Labor Relations Board and the judgment is in direct conflict with and in deprivation of rights guaranteed by the Labor Management Relations Act of 1947 as well as the Constitution of the United States. The Tennessee courts hold that it is for the state courts to decide whether or not there is a "labor dispute" and whether "interstate commerce" is involved and then decides each issue contrary to controlling law.

The action of the Tennessee courts is in direct conflict with this Court's Opinion in the **Engineers Ass'n v. Interlake Steamship Co.**, supra, wherein it was held:

> "The task of determining words defined by the Labor Management Relations Act must in any doubtful cases begin with the National Labor Relations Board whenever a reasonably arguable case is made to that effect."

As was pointed out in the appeal to the Tennessee Court of Appeals (R. 276), and the Petition for Writ of Certiorari to the Supreme Court of Tennessee (R. 329), the interpretation of the terms within the Labor Management Relations Act arguably should be left to the tribunal which Congress has established to administer the Act. Regardless of what result the NLRB would have reached under Sections 7 or 8 (b) (4) of the Federal Act, since the Tennessee courts have intruded into the domain of Labor-Management relations, the judgment is void under the provisions of Art. I, Section 8, and Art. VI of the U. S. Constitution.

We now turn to the terms of the Act which the Tennessee Court of Appeals interpreted and applied without referring to any federal laws or controlling decisions.

Labor Dispute.

The term "labor dispute" is defined by Section 2 (9) of the National Labor Relations Act as follows:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer or employee."

Appendix B, page 27.

In the case of **American Federation of Labor v. Swing, 312 U. S. 321,** it was expressly held that a requirement that there be an employer-employee relationship would be unconstitutional. The Tennessee Supreme Court followed the Swing case in **Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801.** In the Watson case the Tennessee Supreme Court held that a Union could peacefully picket a place of business where it had no members at all and did not seek or hope to have any.

More recent decisions of sister states were cited to the Tennessee courts at each stage of the hearings. The Texas case of **Ex parte Dilley, 334 S. W. 2d 425, 46 LRRM 2716,** is almost identical to the present labor dispute. In that case there was picketing at a construction site to protest working conditions. The Supreme Court of Texas did not hesitate to say that the dispute was arguably for the National Labor Relations Board. The Washington case of **Freeman v. Retail Clerks Union, 363 Pac. 2d 803,** decided July 20, 1961, was also cited to the Court wherein the Supreme Court of Washington stated there was no labor dispute between the employer and its employees, that the pickets were not employees and that the union had no contractual relationship with the employees, actual

or potential. The Washington court held that the matters were arguably for the National Labor Relations Board as the picketing was subject to Sections 7 or 8 of the Labor Management Relations Act.

The South Carolina Supreme Court decision, in the case of **Piedmont Shirt Company v. Amalgamated Clothing Workers, 115 S. E. 2d 499, 46 LRRM 2743**, was also cited as another case wherein there was no employer-employee relationship, actual or potential.

The only conclusion that can be drawn from the decision of the Tennessee Court of Appeals is that there must be an employer-employee relationship, or at least representatives of the union must discuss the matter with the employer before picketing would be permissible. Petitioners well remember the case of **Howard v. Haven, 198 Tenn. 572, 281 S. W. 2d 480**, originating under the same trial judge. In that case there was a conversation between a union business representative and an employer, and based upon that conversation the trial court held that the purpose of the picketing that followed was to cause a breach of contract and the non-union contractor who was dismissed from the job was entitled to treble damages under state law. The plight of the petitioners now under Tennessee law is that if a union merely discusses a controversy with an employer and someone is discharged, the union will be subjected to a damage suit for treble damages. In the event there is no conversation an injunction will issue prohibiting picketing because there is no labor dispute. It was submitted that the type of picketing in the instant case is a typical case of informational picketing.

It was argued to the Tennessee Court of Appeals that the facts presented a labor dispute concerning terms or conditions of employment in that respondents do not rec-

ognize or have union contracts. In the Brief filed with the Court of Appeals it was stated:

> "It is respectfully submitted that the interpretation of this term arguably should be left to the tribunal which Congress has left to administer the Act" (R. 276).

Since then this Court has acted on the question of interpretation of terms of the Act as presented in the case of **Engineers Association v. Interlake Steamship Company** (supra), wherein this Court specifically held the task in considering definitions of the Act "must in any doubtful case begin with the National Labor Relations Board" wherever a reasonably arguable case is made to that effect.

Commerce.

It is also submitted that the question of "affecting commerce" as defined by Section 2 (7) of the Act, Appendix B, page 27, should be left to the National Labor Relations Board when a reasonably arguable case is made to that effect.

This Court held in **Labor Board v. Faiblatt, 308 U. S. 601**, that the power of Congress to regulate interstate commerce is plenary and extends to all commerce be it great or small. The Faiblatt case was followed by the case of **NLRB v. Denver Building Trades Council, 341 U. S. 675.** In 1957 the cases of **Amalgamated Meatcutters v. Fairlawn, Inc., 353 U. S. 20,** and **Gus v. Utah Labor Relations Board, 353 U. S. 23,** were acted upon by this Court. This Court again made it clear that Congress had preempted the jurisdiction into the National Labor Relations Board and it was up to Congress to make any changes. In 1959 the United States Congress acted and in November, 1959, the new law went into effect. Under **Section 701 of the**

Landrum-Griffith Act, 29 U. S. C. 164, the Board was authorized to decline to assert jurisdiction where, in the opinion of the Board, the effect on commerce was not substantial. It was specifically provided that the Board was not able to decline jurisdiction over any labor dispute which it would have asserted jurisdiction under the standards prevailing on August 1, 1959.

Considering the possibility that the Trial Court might fail to take judicial cognizance of the Board's yardstick, counsel for petitioners wrote the National Labor Relations Board, Tenth Region, at Atlanta, Georgia, for an advisory opinion (R. 210) and received a reply (R. 213) which outlined the Board's jurisdictional standards.

The Board's jurisdictional standards require a showing that a non-retail employer has annual inflow and outflow of goods and services from or to persons outside the State amounting to $50,000.00. See **Siemon's Mailing Service, 43 LRRM 1056, 122 NLRB No. 13**, and the case of **Lennox-Haldman Co., 127 NLRB No. 49**. The Board will consider not only the operations of the primary employer but all of the operations of subcontractors or secondary employers involved. See **McAllester Transfer, Inc., 35 LRRM 1281, 110 NLRB No. 224; Reilly Cardage Co., 35 LRRM 1292, 110 NLRB No. 233**, and **Carpenters, etc., 111 NLRB 1025**.

The complaint as amended does not state whether respondents are engaged in intrastate or interstate commerce. The proof shows conclusively that the complainant, Rea Construction Company, is engaged in **interstate** commerce.

The principal witness of the aforesaid respondent was Fritz Diehl who is in charge of the Rea Construction Company at Cleveland, Tennessee. Mr. Diehl testified that

since the job in question started in July, 1960, the Rea Construction Company had spent about one million dollars of which one-half was for materials (R. 84, 85). Diehl's testimony was given on February 22, 1961 (R. 74). Diehl further estimated about seventy-five percent of the materials were purchased within the state and twenty-five percent outside the state (R. 95). On cross-examination Mr. Diehl was requested to check his figures with his Tennessee office as well as the principal office in North Carolina and file an accurate statement as to the materials purchased outside the state. This was done and filed as Exhibits 1 and 2 to the testimony of Fritz Diehl. Item 1 (c) shows that materials bought from sources outside of Tennessee to be $147,099.67 (R. 156). Accordingly, it is unnecessary to consider the other purchases at the involved projects of Rea Construction Company in North Carolina, Tennessee and Georgia. The NLRB had set its yardstick for commerce flowing into or out from a non-retail employer at $50,000.00 prior to 1959, and Congress, in the Landrum-Griffith Act, froze the yardstick at this point.

By the above yardstick a subcontractor, Lonas Construction Company, working at the time of the dispute, was also engaged in interstate commerce, and had been for two previous years. See testimony of Donald R. Gaither (R. 223-225), wherein he itemized purchases from a company totaling over $50,000.00 a year. The stipulation as to latter company which sold the machines shows that they were purchased from out of the state (R. 215).

Solicitors for petitioners were somewhat shocked when the Trial Court and Court of Appeals made no reference to the above facts and controlling cases, and merely stated in the written opinions that only intrastate commerce was involved. The record affirmatively shows that interstate commerce was involved.

Question of Mootness.

The question of mootness was not before the Honorable Tennessee Court of Appeals, yet it fortified its opinion by holding that all questions were moot. The court then proceeded to render a declaratory judgment and adopted the opinion of the Trial Court. Petitioners, in an earlier attempt to advance the case on the trial docket of the Court of Appeals had filed a motion (R. 289-295), stating that by the terms of the contracts respondents had with various construction companies the work was to be completed as of August 1, 1961. Petitioners' Motion for Advancement set forth the following:

> "The plight and predicament of appellants is very serious. All of the thousands of members covered by the Chattanooga Building Trades are engaged in the construction business. If they have a grievance which they wish to publicize they have a limited time to do so—only during the course of construction. Most projects require a year or less for completion. If the Trial Court takes a position which the appellants consider arbitrary or contrary to law they have no means to have the decision of the lower court reviewed. It is respectfully submitted that the employer complainant will delay the case with every legal means once a temporary injunction has been obtained. Once the construction project is over and the case becomes moot the employer will dismiss its bill and pay the costs rather than risk an appellate decision. Thus, the employer is in the enviable position in the field of labor-management of having the Trial Court to settle labor disputes by injunctive process."

The Court of Appeals refused to advance the case for hearing, and this cause came on to be heard for final argument on September 7, 1961. At that time the Court

of Appeals made inquiry as to the construction completion date and both petitioners and respondents agreed that the construction would continue for several weeks due to various construction delays. This fact is set forth in the sworn petition to the Tennessee Supreme Court (R. 311). The Court of Appeals proceeded to hear argument, accept briefs and no further evidence was submitted on the question. The Court of Appeals held the case for judicial determination until January 12, 1962, when it made its decision as set forth in Appendix A.

If the case became moot it did so only because the Tennessee State courts arbitrarily and illegally took jurisdiction. The case is not moot for the following reasons:

This Court has held, in the enforcement of National Labor Relations Board orders, that questions are not moot based upon the possibility of a recurrence, **NLRB v. Penna. Greyhound Lines, 303 U. S. 261.** This matter is arguably before the National Labor Relations Board. It is the desire of the petitioners to picket the respondents in the future under the same conditions, and unless relief is granted by this Honorable Court this will not be permitted under the law as interpreted by the Tennessee courts.

The Tennessee courts have the right to make advisory or declaratory judgments by Sections 23-1102 and 23-1103 of the Tennessee Code Annotated as set out in Appendix B. The Court of Appeals for the Eastern District of Tennessee made such an advisory opinion, and it is respectfully submitted that respondents are estopped from raising a question of mootness. If a court makes an advisory opinion, then it logically follows that a higher court has the authority to review that advisory opinion.

This case is similar to the case of **Plumbers v. County of Door, 359 U. S. 354,** wherein the question of mootness

was raised on oral argument before this Court but does not appear in the decision. A memorandum was submitted in that case, arguing that a case is not moot where, as here, (1) the injunction prohibits the petitioners from picketing at the location should the respondent contractor or any non-union employer be engaged to perform, repair or do maintenance work, (2) the underlying disputes between the petitioners and respondents have not been resolved, and (3) the petitioners' right under the state law to recover damages and court costs incurred in the course of resisting the issuance of the injunction is dependent upon the holding by this Court that the judgment below is erroneous.

Since the injunction is, by its terms, perpetual, the case is not mooted simply because a project which precipitated the strike has been completed. **Local 74, United Brotherhood of Carpenters v. NLRB, 341 U. S. 707, 715.** See also **Amalgamated Association v. Wisconsin Labor Board,** 340 U. S. 416, 417n. The granting of a temporary injunction in the present case was conditioned by the granting of an injunction bond (R. 9-10). The bond is still in full force and effect. Under Tennessee law a defendant, in a proceeding for a temporary injunction, is entitled to recover damages upon an injunction bond in the event it is ultimately determined that an injunction was erroneously issued. Unless the Court rules on the question presented herein, petitioners will be precluded from raising the question upon remand to the state courts.

Where, as here, a timely claim of federal preemption is made in a state court injunction proceeding, the cause should be presumed justiciable in the absence of a clear and convincing showing that the matter has become moot. Every building project is necessarily completed at some definite point in time. Inherent delays in litigating cases

through state courts makes it impossible to bring the case to this Court as a practical matter until most buildings have been completed. E. G. **Local 74, United Brotherhood of Carpenters v. NLRB, 341 U. S. 707, 715.**

Preemption.

The decision by the Tennessee Court of Appeals is similar to those decisions of the Tennessee Appellate Courts in the cases of **Kerrigan Iron Works v. Cook Truck Lines, 296 S. W. 2d 379,** and **Farnsworth & Chambers v. Local Union 429, Electrical Workers, 299 S. W. 2d 8,** which this Court reversed on May 27, 1957, **353 U. S. 968, 969.** The controlling cases of **San Diego Building Trades Council v. Gorman, 359 U. S. 236,** and **Engineers Ass'n v. Interlake Steamship Company** (supra), fully cover this issue.

The Court of Appeals for the Eastern Section has very strong views of its own in labor-management questions, perhaps best illustrated by the concurring opinion in the case of **Volunteer Electric Corp. v. Gann,** decided September 8, 1960, not reported in the official reports but reported at **46 LRRM 3049.**

It is submitted that unless the present decision is reversed the checker-board system, which this Court condemned in the case of **Garner v. Teamsters, 346 U. S. 485,** will be given new life. Prior to the present decision most of our state trial courts recognized the doctrine of preemption.

Under the present decision which is binding on every court in the state of Tennessee the doctrine of preemption no longer exists. Labor-management disputes are left to the whims of trial judges in resolving industrial disputes.

CONCLUSION.

For the foregoing reasons it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

By .....
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Chattanooga, Tennessee,
Counsel for Petitioners.

Dated: November ..., 1962.

KING & FUSTON,
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APPENDIX A.

(Filed January 12, 1962.)

(R. 296-304.)

In the Court of Appeals of Tennessee,
Eastern Section.

Jafco, Inc., et al.
vs.
N. L. Liner et al.

Bradley Equity.
Hon. Glenn W. Woodlee,
Chancellor.

For complainants-appellees: Jac Chambliss, Chattanooga, and Jas. F. Corn, Cleveland, Tenn.

For defendants-appellants, King & Fuston, Chattanooga, Tenn.

Hale, J.

Opinion.

The issues in this case submitted to the Chancellor are fully set forth in his memorandum opinion, viz.,

"Jafco, is a Tennessee Corporation having its only office and place of business located in the City of Cleveland, Bradley County, Tennessee.

"Rea Construction Company, is a foreign Corporation licensed to do business in the State of Tennessee.

"Jafco is the owner and in possession of land located within the corporate limits of the City of Cleveland, Bradley County, Tenn., on which it is presently erecting what is commonly referred to as a shopping center. It is estimated that this development will cost $2,000,000.00, or more; and in order to make possible

its erection and/or completion Jafco was required to enter into an agreement with its tenants that the various buildings under construction would be completed and ready for occupancy upon certain dates, the latest of which is September 1, 1961; and failing in this the tenants, respectively, have the right to cancel rental contracts heretofore made. This, the bill charges and the Court finds from the proof in support thereof, that time is of the essence in the performance of various contracts entered into, otherwise this large venture might well falter and fail if solemn agreements made in good faith are not carried out.

"To erect this shopping center Jafco contracted with Rea Construction Co., Rea Construction Co. thereafter contracted with Lonas Construction Co., operators of heavy equipment, to grade the area required for this large shopping center.

"The parties were thus engaged in the pursuit of this program when on Monday, August 8, 1960, the defendant N. L. Liner appeared on the scene and started picketing the job, bearing a sign which read:

> "'Rea Construction Co., not under contract with Chattanooga Building Trades Council, A. F. of L.'

"The contractors had in their employ men who belonged to the union and those who did not.

"Immediately upon establishing the picket line the union men, most of whom were engaged in the operation of the heavy equipment, walked off the job, the effect of which was to shut it down.

"On the same day the picket line was established this bill was filed and upon fiat of this court, a temporary injunction issued enjoining picketing. N. L. Liner, a citizen and resident of Bradley County, who

was engaged in picketing, Local 846 of the Hod Carriers and Common Laborers Union of America, an unincorporated Association of Labor Organization, having its principal office at 540 Vine Street, Chattanooga, Chattanooga Building Trades Council AFL, an unincorporated Association or Labor Organization, having its principal office and place of business at 540 Vine Street, Chattanooga and Hod Carriers Building and Common Laborers Union of America, an International Union or unincorporated Association or Trade Union which is a non-resident of Tennessee, were named defendants.

"The bill initially filed by Jafco, Inc., was later amended to include Rea Construction Co., as one of the complainants.

"Defendants Local Union 846, Hod Carriers Building & Common Laborers Union of America an international organization filed separate demurrers challenging complainant's right to maintain the suit and specifically plead (1) the Court is without jurisdiction of the subject matter, and (2) defendant's act of peaceful picketing is but a mere exercise of the right of free speech which is guaranteed both by the Federal and State constitutions.

"There was a motion to dissolve the injunction which was heard by Chancellor H. J. Garrett who overruled the motion. He also overruled the demurrers and required the demurrants to answer with leave to rely upon the questions made by demurrers in the answers and at the hearing.

"After the cause was at issue proof was taken; and on an adjourned day of the regular April term the cause was argued and subsequently briefs were filed by solicitors for the parties, respectively.

"Defendant's principal contention involves the question of the Court's jurisdiction. Their able solicitors argue that the National Labor Relations Board has sole and exclusive jurisdiction because Interstate Commerce is involved here.

"The Court is of opinion and, therefore, finds that the erection of the shopping center does not involve Interstate Commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to Interstate Commerce. But, if it did, there was no labor dispute.

"The job was proceeding smoothly and without interruption until the Chattanooga Trades Council voted to place a picket on the job. Their excuse for this was simply to 'advertise to the public when making future contracts that Rea was not under contract with Chattanooga Building Trades Council.'"

"Now, with respect to the right of peaceful picketing and, as in this case by strangers or third parties, the insistence made that it was the exercise of free speech and lawful is farfetched. The defendants involved here had no contract with complainants nor had they even attempted to negotiate one. The insistence that they were there to 'advertise to the public' for future purposes is but a mere pretext for their real purpose which was to shut down this project and thus cause the breach of contracts previously negotiated and valid under the laws of Tennessee.

"As late as December the Supreme Court of Tennessee in the case of Clyde Harrison Large v. Arlin Dick et al., 343 S. W. 2d 693, held:

> "'That every man has the right to property in his own labor, and the right to work without interference; and whoever intentionally interferes

with this right is liable in tort for the damage caused, unless he can show a privilege or justification for such interference.' "

"In this case the Court has found no privilege or justification for defendants' intentional interference with complainants and their employees' right to negotiate and execute contracts, breach of which would result in irreparable damages to complainant, Jafco.

"In conclusion it will be observed that defendants have been free at all times to apply to the National Labor Relations Board for relief had they thought this Board had jurisdiction. Their failure to seek such relief leaves but one obvious conclusion, that the Board is without jurisdiction.

"Thus, the bill will be sustained and the injunction heretofore issued will be made perpetual."

Decree was entered accordingly, from which the defendants duly prayed, were granted and have perfected this appeal. There are several assignments of error. All must be overruled.

In the first place the questions in this case have become moot. The appellants in brief filed June 22nd, 1961, in which they were seeking to advance the cause for hearing, stated:

"In the instant case, the right of picketing will become moot by August 1, 1961, as the construction will be completed and the building ready for occupancy. Appellants know that they desire to picket one of the complainants, Rea Construction Company, this coming fall on a project which will require approximately six or eight months of construction. Without judicial review of this case they can only expect the same Trial Court to act the same, and

again they cannot possibly get the case to the appellate court for a decision within that time."

We have too much work to do to prevent us from attempting to render advisory opinions in future litigation that may or may not arise.

In Malone v. Peay, 157 Tenn. 429, there was involved an attempt to obtain an injunction to prevent the purchase of lands for the Smoky Mountain Park. It was denied by the trial court. Complainants appealed and on that appeal the Supreme Court, speaking through Mr. Chief Justice Green, said:

"At the bar of this court it was conceded that the purchase of the lands, sought to be enjoined, had been consummated. Such being the fact, the bill presents only a moot case, insofar as it seeks an injunction. An injunction would accomplish nothing now, and the bill in this aspect cannot be maintained."

The same principle applies to suits under the Ouster Law. In State ex rel. v. Hassler, 196 Tenn. 158, the relators had unsuccessfully sought to oust a County School Superintendent, and then appealed to the Supreme Court. Pending the appeal the defendant's term expired and he was duly elected to succeed himself. It was held that the appeal could not be entertained, and was dismissed at the cost of appellants.

Further, we concur with the Chancellor's finding that a bona fide labor dispute did not exist. Defendants never at any time sought to obtain a contract from the Rea Construction Company which had a policy of employing union and non-union personnel without discrimination.

Defendants say that when they placed this picket on the line it was merely for education. We cannot accept that

explanation which doesn't explain. They knew that when this picket was placed at this entrance to the work that it would result in union employees refusing to cross the line, and this is exactly what happened, thus causing a complete work stoppage. In short, we find that the action of the defendants was spiteful and malicious in an attempt to injure both Jafco, Inc., and the Rea Construction Company.

What has been said requires the affirmance of the decree below, with cost against the appellants and surety on appeal bond.

Affirmed.

Hale, J.

Concur:

McAmis, P. J.

Cooper, J.

In the Court of Appeals of Tennessee, at Knoxville,
May Term, 1961.

Tuesday, January 16th, 1962.

Court met pursuant to adjournment present and presiding the Honorable Judges Luke M. McAmis, Winfield B. Hale and R. E. Cooper.

The minutes of yesterday were read and signed when the following proceedings were had to-wit:

Filed Jan. 12, 1962,
W. H. Eagle, Clerk.

Jafco, Inc., et al.
vs.
N. L. Liner, et al.

Bradley Equity.
Affirmed.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Bradley County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the costs of the cause will be paid by N. L. Liner, Local 846, Hod-Carriers Union, Chattanooga Building Trade, AFL, Hod Carriers Bldg., Common Laborers Union of America et al., and Surety Fidelity and Deposit Company of Maryland, for which let execution issue.

APPENDIX B.

Pertinent Statutory Provisions.

29 U. S. C., Sec. 152. **Definitions.**

When used in this subchapter—

"• • •

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

• • •

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer or employee."

29 U. S. C., Sec. 157. **Right of Employees as to Organization, Collective Bargaining, Etc.**

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

29 U. S. C., Sec. 158 (b) (4).

"(b) It shall be unfair labor practice for a labor organization or its agents—

• • •

(4) (i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if

another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;"

Tennessee Code Annotated, Section 23-1102. General Power of Courts.

"Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree."

Tennessee Code Annotated, Section 23-1103. Construction of statutes and written instruments.

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Tennessee Code Annotated, Section 47-1706. Procurement of breach of contracts unlawful—Treble damages.

"It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of said contract; and the party injured by such breach may bring his suit for said breach and for such damages."

Tennessee Code Annotated, Section 50-208. Denial of employment because of affiliation or nonaffiliation with labor union unlawful.

"It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

Tennessee Code Annotated, Section 50-209. Contracting for exclusion from employment because of affiliation or nonaffiliation with labor union unlawful.

"It shall be unlawful for any person, firm, corporation or association of any kind to enter into any contract, combination or agreement, written or oral, providing for exclusion from employment of any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

APPENDIX C.

In the Chancery Court, Bradley County,
Cleveland, Tennessee.

Jafco, Inc., et als.
vs.
N. L. Liner et als.
No. 6377.

(Filed September 30, 1960.)

(R. 38-40.)

Memo.

This matter is before the Court on a motion to dissolve, on bill and answer, the temporary injunction heretofore issued in the case.

The Complainant, Jafco, Inc., is engaged in building a shopping center in the center of Cleveland, Bradley County, Tennessee. The cost of said shopping center is approximately $2,000,000. The Complainant Rea Construction Company is the general building contractor in charge of and carrying out said construction. The completion date of the contract of construction is August 1, 1961. Subcontractors of the Rea Construction Company are engaged in moving dirt on the building site. On Monday, August 8, 1960, the defendant N. L. Liner appeared at the scene of the construction with a picket sign and began to picket said site. The picket sign charged as follows: "Rea Construction Company not under contract with Chattanooga Building Trades Council, A. F. L." Soon after the picket was on the scene the work on the project completely stopped because the workers refused to work while the picket was there. The original bill in this cause was filed on August 9, 1960, and fiat for injunction issued on

application of the petitioners before the filing of the bill on August 8, 1961. With the restraint of the pickets the construction continued. It is apparent from the pleading that there is no labor dispute in existence between complainants and the defendant, the defendants are not seeking a contract with the complainant.

It is the theory and insistence of the complainants that the existence of labor dispute is a prerequisite for obtaining jurisdiction of the National Labor Relations Board and that since it is not a labor dispute that that board is without jurisdiction to intervene. Various authority is cited by complainants to show that the state courts have jurisdiction. Authority is also cited by the complainants, Gibson's Suits in Chancery, Section 898, prohibiting the dissolution of an injunction where the dissolution of the injunction would be tantamount to a decision on the merits or where the injunction is the real remedial part of the bill. The insistence is also made that the question of the jurisdiction of this court should properly be raised by a plea in abatement or demurrer. The record shows that a demurrer was filed on the 12th day of September, 1960. Further complainants contend that the action of the defendants is contrary to the statutory law of this state described as the Tennessee anti-closed shop law and that the effect of the picketing is to stop work on the project and thereby cause a breach of contract which if prohibited by the Tennessee Statute prohibiting third party interference in tracts.

It is the insistence of the defendants, on the other hand, that there is no complaint of violence or mass picketing, that its sole purpose is to advertise and let the public know in the vicinity of the construction that the Rea Construction Company is not under union contract and that they have a right to so advertise in this manner. And further that the state courts have no jurisdiction and that the conduct of the defendants is protected under the

National Labor Relations Act. It is also argued in behalf of defendants that due to the size of this operation that the contractors are engaged in interstate commerce. They also deny that the actions of the defendant in any way violate the so-called right to work law of this state or any other law. It is further argued that if an injunction of this nature is allowed to stay in effect the union has no practical way of reaching the public to advertise the truth, and that if in effect destroys their right to picket.

I think it is patently obvious in this case that the injunction relief sought is in fact the remedial part of the bill and its dissolution would be the equivalent of a decision on the merits. It is further the view of the court that there is no bona fide labor dispute between the parties in this litigation and that the existence of a labor dispute is a prerequisite, along with the involvement of interstate commerce, for the National Labor Relations Board before obtaining jurisdiction. I think it is clear from these facts that the National Labor Relations Board has not preempted the state courts' rights in a case resting on the foregoing facts, under the Aladdin Industries case, 23 S. W. (2d) 322, and in the case of Newport Industries v. Lake Charles Metal Trades Council, U. S. District Court for the Western District of Louisiana, 17 Labor Cases 65, 284.

In view of the foregoing I feel that I must overrule the motion to dissolve the injunction. The demurrers filed September 12th are also overruled but the defendant is allowed to rely upon the same in his answer and the case is remanded to the rules for proof.

So Order:

This the 29th day of September, 1960.

H. J. Garrett,
Chancellor.

Jafco, Inc., et al.,
vs.
N. L. Liner, et al.
No. 6377.

In the Chancery Court of Bradley County, Tennessee.

(Filed March 10, 1961.)

(R. 41).

Order.

This cause came on to be heard before the Court on a motion to dissolve, on bill and answer, the temporary injunction heretofore issued in the case, and after hearing argument of said motion and studying the briefs filed in connection therewith, the Court is of the opinion that said motion is not well taken for the following reasons:

1. It is obvious that the injunctive relief sought is in fact a remedial part of the bill, and its dissolution would be the equivalent of a decision of the case on its merits, and such is forbidden by the Chancery practice of this state.

2. There is no bona fide labor dispute between the parties in this litigation and therefore the state court has jurisdiction of the matter and the same has not been preempted by the National Labor Relations Board.

The motion to dissolve the injunction is accordingly overruled and disallowed.

It is further the order of the Court that the demurrers filed on September 12 and submitted to the Court simultaneously with the motion to dissolve are also overruled, but the defendant is allowed to rely upon the same in his answer.

It is further ordered that the case be and the same hereby is remanded to the rules for the taking of proof.

H. J. Garrett,
Chancellor.

O. K.

Jac Chambliss,
Solicitors for Complainants.

.....
Solicitors for Defendants.

Jafco, Inc., et al.,
vs.
N. L. Liner, et al.
} No. 6377.

In the Chancery Court at Cleveland, Tennessee.

(Filed June 2, 1961.)

(R. 247-250.)

Memo.

Jafco is a Tennessee Corporation having its only office and place of business located in the City of Cleveland, Bradley County, Tennessee.

Rea Construction Company is a foreign Corporation, licensed to do business in the State of Tennessee.

Jafco is the owner and in possession of land located within the corporate limits of the City of Cleveland, Bradley County, Tennessee, on which it is presently erecting what is commonly referred to as a shopping center. It is estimated that this development will cost $2,000,000.00, or more; and in order to make possible its erection and/or completion Jafco was required to enter into an agreement with its tenants that the various buildings under con-

struction would be completed and ready for occupancy upon certain dates, the latest of which is September 1, 1961, and failing in this the tenants, respectively, have the right to cancel rental contracts heretofore made. Thus, the bill charges and the Court finds from the proof in support thereof, that time is of the essence in the performance of various contracts entered into, otherwise this large venture might well falter and fail if solemn agreements made in good faith are not carried out.

To erect this shopping center Jafco contracted with Rea Construction Co. Rea Construction Co., thereafter contracted with Lonas Construction Co., Inc., operators of heavy equipment, to grade the area required for this large shopping center.

The parties were thus engaged in the pursuit of this program when on Monday, August 8, 1960, the defendant N. L. Liner appeared on the scene and started picketing the job, bearing a sign which read:

"Rea Construction Co., not under contract with Chattanooga Building Trades Council, A. F. of L."

The contractors had in their employ men who belonged to the union and those who did not.

Immediately upon establishing the picket line the union men, most of whom were engaged in the operation of the heavy equipment, walked off the job, the effect of which was to shut it down.

On the same day the picket line was established this bill was filled and upon fiat of this Court, a temporary injunction issued enjoining picketing. N. L. Liner, a citizen and resident of Bradley County, who was engaged in picketing, Local 846 of the Hod Carriers and Common Laborers Union of America, an unincorporated Association or Labor Organization, having its principal office at 540 Vine Street, Chattanooga, Chattanooga Building Trades

Council AFL, an unincorporated Association or Labor Organization, having its principal office and place of business at 540 Vine Street, Chattanooga, and Hod Carriers Building and Common Laborers Union of America, an International Union or unincorporated Association or Trade Union which is a non-resident of Tennessee, were named defendants.

The bill initially filed by Jafco, Inc., was later amended to include Rea Construction Co., as one of the complainants.

Defendants, Local Union 846, Hod Carriers Building & Common Laborers Union of America and Hod Carriers Building and Common Laborers Union of America, an international organization, filed separate demurrers challenging complainants' right to maintain the suit against either or both of these defendants. N. L. Liner and the Chattanooga Building Trades Council AFL, filed a joint answer challenging complainants' right to maintain the suit and specifically plead (1) the Court is without jurisdiction of the subject matter, and (2) defendant's act of peaceful picketing is but a mere exercise of the right of free speech which is guaranteed both by the Federal and State Constitutions.

There was a motion to dissolve the injunction which was heard by Chancellor H. J. Garrett who overruled the motion. He also overruled the demurrers and required the demurrants to answer with leave to rely upon the questions made by demurrers in the answers and at the hearing.

After the cause was at issue proof was taken; and on an adjourned day of the regular April term the cause was argued and subsequently briefs were filed by solicitors for the parties, respectively.

Defendants' principal contention involves the question of the Court's jurisdiction. Their able solicitors argue that the National Labor Relations Board has sole and exclusive jurisdiction because Interstate Commerce is involved here.

The Court is of opinion and, therefore, finds, that the erection of the shopping center does not involve Interstate Commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to Interstate Commerce. But, if it did, there was no labor dispute.

The job was proceeding smoothly and without interruption until the Chattanooga Trades Council voted to place a picket on the job. Their excuse for this was simply to "advertise to the public when making future contracts that Rea was not under contract with Chattanooga Building Trades Council."

Now, with respect to the right of peaceful picketing and, as in this case by strangers or third parties, the insistance made that it was the exercise of free speech and lawful is far-fetched. The defendants involved here had no contract with complainants nor had they even attempted to negotiate one. The insistence that they were there to "advertise to the public" for future purposes is but a mere pretext for their real purpose which was to shut down this project and thus cause the breach of contracts previously negotiated and valid under the laws of Tennessee.

As late as December the Supreme Court of Tennessee in the case of Clyde Harrison Large v. Arlin Dick et al., 343 S. W. 2d 693, held:

> "That every man has the right of property in his own labor, and the right to work without interference; and whoever intentionally interferes with this right is liable in torte for the damage caused, unless he can

show a privilege or justification for such interference."

In this case the Court has found no privilege or justification for defendants' intentional interference with complainants and their employees right to negotiate and execute contracts, breach of which would result in irreparable damages to complainant, Jafco.

In conclusion it will be observed that defendants have been free at all times to apply to the National Labor Relations Board for relief had they thought this Board had jurisdiction. Their failure to seek such relief leaves but one obvious conclusion, that the Board is without jurisdiction.

Thus, the bill will be sustained and the injunction heretofore issued will be made perpetual.

The defendants will have 30 days in which to perfect their appeal.

So decree.

This May 31, 1961.

s/ Glenn W. Woodlee, Chancellor.

Circuit Court, Bradley County, Tennessee.

Jafco, Inc., et al.
vs.
N. L. Liner, et al.
No. 6377.

(Filed June 15, 1961, R. 251-252.)

Final Decree.

This cause came on to be heard before the Honorable Glenn W. Woodlee, Chancellor, holding the Chancery Court of Bradley County at Cleveland, Tennessee, upon

the Bill for Injunction as amended, the answers of all the defendants, the depositions and stipulation of the parties, the briefs of the respective parties, the oral argument of the solicitors in this cause, and the entire record, from all of which it appears that the complainants are entitled to an injunction as sought by reason of the findings and conclusions of law set forth in the Chancellor's memorandum heretofore filed on the second day of June, 1961, which said memorandum is incorporated herein by reference in its entirety but not for copy, it is therefore

Ordered, Adjudged and Decreed by the Court that the injunction heretofore granted in this cause prohibiting and restraining the defendants and all their pickets, strikers and sympathizers from picketing the JAFCO, Inc. shopping center site in Cleveland, Tennessee or in any other manner interfering with the performance of said job is hereby continued and made perpetual.

The costs are taxed against the defendants for which execution may issue.

To all of which Decree and all previous orders of the Court the defendants duly except and pray an appeal to the Court of Appeals sitting at Knoxville, Tennessee, which is hereby granted upon the execution of an appeal bond and otherwise perfecting the appeal in the manner provided by law.

This 16th day of June, 1961.

G. W. Woodlee,
Chancellor.

Approved:

Jac Chambliss,
James F. Corn,
Solicitors for Complainants.

King & Fuston,
Solicitors for Defendant.

APPENDIX D.

(Filed September 3, 1960.)

(R. 29-35.)

Chancery Court, Bradley County, Tennessee.

Jafco, Inc., et al.,
vs.
N. L. Liner.
} No. 6377.

Answer.

Come the defendants, with the exception of Hod Carriers, Building and Common Laborers Union of America, an International Union, and Local 846 thereof, in the capacities in which they are used, and for answer to so much and such parts of the bill as they are advised is relevant, material and necessary to answer, say:

The original bill has been superseded by an amended and supplemental bill, the amended and supplemental bill contains all of the allegations of the original bill and in addition thereto other allegations, therefore each of the above defendants answering individually, for their joint, separate and several answers to the amended and supplemental bill say:

I.

The allegations contained in Paragraph I of the Amended and Supplemental bill are denied. The Parties may be subject to the jurisdiction of the Court, but the Court does not have jurisdiction of the subject matter as will be shown hereinafter.

II.

It is admitted that the complainant, Jafco, Inc., is a corporation engaged in the building of a vast shopping center

in Cleveland, Tennessee, to cost in the neighborhood of $2,000,000.00. It is also admitted that Rea Construction Company is the general building contractor and in charge of construction. These defendants would show to the Court that due to the size and magnitude of the project that both complainants are engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended.

III.

It is admitted, on information and belief, that the complainant, Jafco, Inc., has entered into a written contract with complainant, Rea Construction Company. These defendants have not been advised of the terms of the contract, but allege that said provisions will speak for themselves.

It is assumed that said contract has the normal and customary provision that relieves the parties of the time element in the event of labor difficulty.

It is denied that the parties would suffer irreparable damage or be subject to a cancellation of the contract in the event the contract is not performed by a certain time.

The allegations in regard to Jafco, Inc., having to cancel contracts with its tenants is denied and strict proof demanded. In the event that any of the complainants suffer any damages the same is incidental and damages for which no action lies.

IV.

On information and belief it is probably true that complainant, Jafco, Inc, has entered into separate contracts with various subcontractors. It is denied that complainants will suffer great and irreparable damage and loss in the event there are normal and lawful interruptions caused by legitimate and protected labor advertising.

V.

All of the allegations contained in Paragraph V are denied in the event same become material.

VI.

It is admitted that work has begun on said project but it is denied that any work was stopped by the activities of defendants. It is specifically denied that there has been any illegal activity on the part of any of the defendants.

VII.

The allegations contained in Paragraph VII are denied and strict proof demanded.

VIII.

It is admitted that the defendant, N. L. Liner, appeared on the scene of construction bearing a picket sign which truthfully stated that Rea Construction Company was not under contract with Chattanooga Building Trades Council, AFL. Complainants tacitly admit the truth of the banner. It is denied that the defendant, N. L. Liner, was the agent or acted in any capacity for the defendant Local 846 or of Hod Carriers International Union.

Defendants would show that the Chattanooga Building Trades Council embraces several counties in Tennessee, one of which is Bradley County; that a great many of the members of organized labor live in Bradley County and customarily work on projects in that County, as well as in Hamilton County, and other counties in the vicinity. All other allegations of Paragraph VIII are denied and strict proof demanded.

IX.

The allegations contained in Paragraph IX are denied and strict proof demanded.

X.

All allegations contained in Paragraph X are denied and strict proof demanded. These defendants would show to the Court that the Tennessee Common Law and Tennessee Statutory Law does not apply to interstate commerce where the National Labor Relations Board has jurisdiction.

XI.

The allegations contained in Paragraph XI are denied and strict proof demanded.

XII.

The allegations of Paragraph XII are denied and strict proof demanded.

It is alleged that the said contracts are not material in those cases involving interstate commerce where the National Labor Relations Board has full and complete jurisdiction. In the event that the contracts referred to become material, these defendants again allege that complainants could and should have protected themselves by the customary labor provision in their contracts.

XIII.

These defendants admit that Sections 50-208 and 20-209 of the Tennessee Code Annotated are correctly quoted. These defendants would show however, that said sections have no application to a cause of action affecting interstate commerce which is subject to the National Labor Relations Act. In the event said sections become material the innuendo that these defendants might be violating said sections is denied and strict proof demanded.

XIV.

The allegations of Paragraph XIV are denied and strict proof demanded. Again, these defendants would show to

the Court that interstate commerce is involved and that the allegations contained in said paragraph are immaterial where the National Labor Relations Board has full and complete jurisdiction.

XV.

The allegations contained in Paragraph XV are denied and strict proof demanded.

These defendants would show to the Court that the purpose of the picketing is to inform members of organized labor in Cleveland and vicinity, sympathizers of the Labor Movement, and the public in general, that the complainant's project is not under contract with appropriate bargaining labor organizations. The effect that is sought is that persons who hire contractors hereafter will know which are union contractors and which are not. If those people desire to hire such contractors as complainants they are so informed, or if they desire contractors who maintain union contracts they are so informed. It is the hope of organized labor that the public, once informed, will hire contractors who agree to contracts protecting the employees as to wages, hours and working conditions. Without such publicity there would be no effective way of informing the public in that vicinity.

The allegations contained in the last paragraph immediately prior to the prayer for relief is denied. In the event that the allegations regarding the loss of money, damages, loss of contracts, invasion of property rights and such, become material it is alleged that they are damnum absque injuria.

XVI.

All allegations of the original bill, as amended by the amended and supplemental bill, not heretofore denied, explained or admitted are here and now denied as though specifically denied.

XVII.

And now for further answer and defense, these defendants aver that the allegations of the original bill as amended charge nothing other than peaceful picketing with a banner which speaks the truth. The alleged purposes are conclusions, and are matters for the National Labor Relations Board.

The general overall purpose of complainants' bill is to avert the purposes and policies of the National Labor Relations Act as amended by preventing peaceful picketing. The conduct of the picketing is either protected conduct or unlawful conduct within the meaning of the National Labor Relations Act as amended. In either event the National Labor Relations Board has sole and exclusive jurisdiction of the subject matter.

Therefore, this Court is without power or authority to decide the issues in this cause, and any judgment rendered by this Court, other than an order of dismissal, would be null and void.

XVIII.

For further defense, these defendants allege that the Court is without jurisdiction to restrain peaceful picketing for the reason that the granting of such injunction would be to deprive these defendants of the right of free speech guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and the rights guaranteed by the Constitution of the State of Tennessee.

And now having fully answered these defendants pray to be dismissed with their reasonable costs.

S. Del Fuston,
For King & Fuston,
Solicitors for Answering Defendants,
723 Chattanooga Bank Building,
Chattanooga, Tennessee.

State of Tennessee,
County of Hamilton.

C. Earle Williams, being first duly sworn, makes oath that he is President of the Chattanooga Building & Construction Trades Council, that he has read the foregoing answer and the facts and statements contained therein are true of his own knowledge, information and belief.

C. Earle Williams.

C. Earle Williams.

Sworn to and subscribed before me, this 2nd day of September, 1960.

My Comm. Expires 10-14-61.

Nixola Ziegler,
Notary Public.

In the Chancery Court Bradley County,
Cleveland Tennessee.

Jafco, Inc., et al.,
v.
N. L. Liner, et al.
No. 6377.

(Filed September 3, 1960.)

(R. 28.)

Motion to Dissolve Injunction and Dismiss Bill.

Come defendants, by their solicitors, and move the Court to dissolve the injunction heretofore granted in this cause and to dismiss the bill on the following grounds, to-wit:

1. There is no equity on the face of the bill of complaint.

2. On Bill and Answer.

3. This Court is without jurisdiction to grant an injunction against peaceful picketing because:

(a) It constitutes an encroachment upon the exclusive jurisdiction of the National Labor Relations Board over the subject matter.

(b) The injunction against peaceful picketing violates defendants' right of freedom of speech as guaranteed by the constitutions of the United States and of the State of Tennessee.

/s/ S. Del Fuston,
For King & Fuston,
Solicitors for Chattanooga Bldg. Trades.

Certificate of Service.

This 2nd day of Sept., 1960.

By: S. Del Fuston.

In the Court of Appeals of Tennessee
at Knoxville, Tennessee.

Jafco, Inc., et al.,
vs.
N. L. Liner, et al.
No. 1.
Bradley County
Equity Docket.

Statement of Case, Assignment of Errors, Brief and Argument of Appellants.

(Filed June 22, 1961.)

(R. 258-278.)

(Pages 1-3 and 9-19 are not reprinted.)

Assignment of Error.

I.

The Chancellor erred in ordering, adjudging and decreeing that a temporary injunction issue prohibiting the defendants and all the pickets, strikers and sympathizers

from picketing the JAFCO, Inc., shopping center site in Cleveland, Tennessee, or in any other manner interfering with the performance of said job (R. 9); by failure to dissolve the injunction at the hearing on the Motion to Dismiss (R. 38), and by making said injunction permanent in the Final Decision (R. 251).

The Court in rendering the injunction necessarily had to take jurisdiction of the subject matter.

The Bill of Complaint as amended alleges conduct that is prohibited by Sec. 8 (b) (4) (i) (ii) of the National Labor Relations Act as amended in 1959 (29 USC 158). The appellants contend that the conduct is protected by Section 7 of the National Labor Relations Act. The conclusion that can be drawn is that the conduct is either protected or prohibited. In either event a controversy is present that can only be resolved by the National Labor Relations Board.

Congress has pre-empted jurisdiction in the subject matter in the National Labor Relations Board.

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, April 20, 1959.

In the Garman case the Supreme Court held that the complaining party must go to the National Labor Relations Board if the conduct arguably falls within the protection of the National Labor Relations Act, Section 7, or is prohibited conduct set forth in Section 8. For a list of authorities see

Wagner v. Hartnitt, Del. Sup. Court, July 16, 1959, 153 A. 2d 584, 44 LRRM 2980;

Piedmont Shirt Co. v. Amalgamated Clothing Wkrs., July 18, 1960, Sup. Ct. of S. C., 115 S. E. 2d 499, 46 LRRM 2743;

Dempsey v. Great Atl. & Pac. Tea Co., Nov. 2, 1960, 208 N. Y. S. 2d 18 (N. Y. Sup. Ct.)

II.

The Court erred in ordering, adjudging and decreeing that only intrastate commerce was involved in this cause. Opinion (R. 249), and incorporated in Final Decree (R. 251).

The power of Congress to regulate interstate commerce is plenary and extends to all commerce, be it great or small.

See Labor Board v. Faiblatt, 306 U. S. 601.

In 1959 Congress froze the National Labor Relations Board's jurisdictional standards that were in effect **29 U. S. C. 164.**

The Board's jurisdictional standards require showing that a non-retail employer has an annual inflow or outflow of goods and services from and to persons outside the state amounting to only $50,000.00.

See letter from NLRB, R. 213, listing:

Seimons Mailing Service, 43 NLRB 1056, 122 NLRB 13.

The Board will also consider the operation of the secondary employers involved.

McAllester Trans. Co., 35 LRRM 1281.

The only testimony of the prime contractor, Rea Construction Company, was by its chief official of the construction job, Fritz Diehl. He testified that in the first ten months of operation this company purchased $147,096.67 in materials from outside the State of Tennessee. See Exhibit I, Diehl's testimony (R. 156).

The secondary employer, Lonas Construction Company, was also engaged in interstate commerce within the meaning of the Act. See testimony of Donald R. Gaither (R. 223-225) wherein he testified as to the amount of machinery

purchased from the Nixon Machinery & Supply Company, and the stipulation as to where the machines were purchased by the Nixon Company (R. 215).

III.

The Chancellor erred in ordering, adjudging and decreeing that there was no labor dispute, Opinion of the Court, (R. 249), incorporated in Final Decree (R. 251).

This is a matter for the National Labor Relations Board to interpret since the case arguably should be before the National Labor Relations Board.

The definition of a "Labor Dispute" as defined by the National Labor Relations Act includes any controversy regardless of how the disputants stand in the approximate relation of employer and employee, 29 U. S. C. A. 152. See

Am. Fed. of Labor v. Swing, 312 U. S. 321.

And the same definition followed by the Supreme Court of Tennessee in

Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801;

Said cases hold that peaceful picketing is lawful without the presence of a labor dispute.

IV.

The Court erred in ordering, adjudging and decreeing an injunction against peaceful picketing under state laws as the injunction is in violation of the 14th Amendment of the Constitution of the United States. See **Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801.**

V.

The Chancellor erred in ordering, adjudging and decreeing that the Demurrer of the Hodcarriers Local 846 and the International Hodcarriers Union be overruled (R. 38-41), and in its failure to dismiss said parties in the Final Decree (R. 251).

There are no facts in the complaint as amended showing that Local 846 participated in the picketing other than as a member of the Chattanooga Building Trades.

There are no facts involving the International Union and the International is not responsible for the acts of its Local.

Coronado Co. v. U. Mine Wkrs., 268 U. S. 295.
U. Mine Wkrs. v. Coronado Co., 259 U. S. 344, 393.

VI.

The Chancellor erred in ordering, adjudging and decreeing that the defendant should pay the Court costs. See authorities cited in the Assignment of Error No. I, above.

The Issues.

I.

The first three Assignments of Error raise the question:

Do the Tennessee courts have jurisdiction of a case wherein the conduct of which complaint is made arguably should be before the National Labor Relations Board?

II.

The fourth Assignment of Error raises the question:

Does the conduct of which complaint is made violate state laws, or is the conduct protected by the 14th Amendment to the Constitution of the United States?

III.

The fifth Assignment of Error raises the question:

Is an international union bound by the acts of the agents and representatives of a local union; and is a local union bound by the acts of pickets which were placed by another labor organization?

IV.

The sixth Assignment of Error raises the question:

Should the court costs be taxed against the defendants in the event issues I and II are found in favor of the appellants?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 43

N. L. LINER, et al.,

Petitioners

Versus

JAFCO, INC., et al.,

Respondents

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee,
Eastern Section

JAC CHAMBLISS
1111 Maclellan Building
Chattanooga, Tennessee

JAMES F. CORN
Village Office Building
Cleveland, Tennessee

Counsel for Respondents

CHAMBLISS, CHAMBLISS & HODGE

JOHN F. DAVIS, CLERK

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JAMES F. CORN
Village Office Building
Cleveland, Tennessee

Counsel for Respondents

CHAMBLISS, CHAMBLISS & HODGE
1111 Maclellan Building
Chattanooga, Tennessee

Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

N. L. LINER, et al., Petitioners,	)	
v.	)	Number 628
JAFCO, INC., et al., Respondents.	)	

Reply Brief to

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee,

Eastern Section

CASES CITED

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45 LC 59,594 6

Wooten vs. Ohler,
45 LC 50,557 6

Petitioners, certain labor organizations, seek to have the Court review and set aside certain rulings made by the courts of the State of Tennessee.

The Chancery Court of Hamilton County held, on two separate occasions, that picketing by the labor organizations should be enjoined.

In the first ruling, which was by Chancellor Garrett, the facts are reviewed and the Court made a specific finding that "there is no bona fide labor dispute between the parties in this litigation and that the existence of a labor dispute is a prerequisite, along with the involvement of interstate commerce, for the National Labor Relations Board before obtaining jurisdiction." (See page 33 of the Petition for Certiorari.)

The second occasion was when the case was finally decided by the lower court through the decision of Chancellor Glenn Woodlee. He agreed with Chancellor Garrett that "there was no labor dispute." (See page 38 of Petition for Certiorari.)

The third time that such a finding was made was by the Court of Appeals which unanimously sustained the rulings of the lower court and stated that "we concur with the Chancellor's finding that a bona fide labor

interested in trying to get a contract and was asked the following questions and gave the answers appearing thereto:

> "Q Was there any labor dispute of any kind in existence at that time between the Chattanooga Building Trades Council on the one hand or the unions connected with it and Jafco and Rea Construction Company, was there any labor dispute in existence between them?
>
> "A Directly, I guess not. I mean, I don't know of any particular item.
>
> "Q In other words, you had not been to them, the unions had not been to them to discuss any matters or ask them anything at all?
>
> "A Well, I couldn't say that the unions hadn't been. I have never talked to anybody either with Rea or with Jafco.
>
> "Q So far as you know, no union representative had ever talked to them about having contracts on this job?
>
> "A I don't know of it.
>
> "Q So far as you know, then, the Chattanooga Building Trades Council had never sought from these parties a contract, is that right?
>
> "A That's correct."

Yet the language on the sign carried by the picket clearly indicates that the union was directing the public's attention primarily to the fact that the employer was not under contract!

The union has gotten itself caught between the Scylla of trying to obtain a breach of contract for which they would be liable in damages -- and the Charybdis of

to have the Court review and set aside certain rulings made by the courts of the State of Tennessee.

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In the first ruling, which was by Chancellor Garrett, the facts are reviewed and the Court made a specific finding that "there is no bona fide labor dispute between the parties in this litigation and that the existence of a labor dispute is a prerequisite, along with the involvement of interstate commerce, for the National Labor Relations Board before obtaining jurisdiction." (See page 33 of the Petition for Certiorari.)

The second occasion was when the case was finally decided by the lower court through the decision of Chancellor Glenn Woodlee. He agreed with Chancellor Garrett that "there was no labor dispute." (See page 38 of Petition for Certiorari.)

The third time that such a finding was made was by the Court of Appeals which unanimously sustained the rulings of the lower court and stated that "we concur with the Chancellor's finding that a bona fide labor dispute did not exist. Defendants never at any time sought to obtain a contract from the Rea Construction

Company which had a policy of employing union and non-union personnel without discrimination." (See page 24 of Petition for Certiorari.)

Yet the petition for certiorari is filled with references to the existence of an alleged labor dispute.

Petitioners insist that the Tennessee courts have no jurisdiction to enjoin picketing which they say "shows that the dispute and commerce involved were arguably within the meaning of the National Labor Relations Act."

Bearing in mind that the National Labor Relations Act defines a labor dispute as:

> "Any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relationship or employer and employee,"

what are the facts in this case?

* * * *

Jafco wished to build a shopping center in Cleveland, Tennessee, and made a contract with the Rea Construction Company to build it.

Rea Construction Company employs both union and

union personnel without discrimination." (See page 24 of Petition for Certiorari.)

Yet the petition for certiorari is filled with references to the existence of an alleged labor dispute.

Petitioners insist that the Tennessee courts have no jurisdiction to enjoin picketing which they say "shows that the dispute and commerce involved were arguably within the meaning of the National Labor Relations Act."

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what are the facts in this case?

* * * *

Jafco wished to build a shopping center in Cleveland, Tennessee, and made a contract with the Rea Construction Company to build it.

Rea Construction Company employs both union and non-union personnel.

While the initial earth-moving operation was

proceeding and a building site was being levelled, the defendants decided to take action and placed a picket on the job who bore a sign stating:

> "Rea Construction Company not under contract with Chattanooga Building Trades Council, AFL."

The picketing had the effect of shutting down the job.

An injunction was sought on the ground that the picketing appeared to be for the purpose of obtaining a breach of contract, which would be illegal under state law.

A preliminary injunction issued, and thereupon the defendants filed an answer asserting, among other things, that the state court had no jurisdiction since the sole jurisdiction lay with the National Labor Relations Board.

The defendant labor organizations asserted in their answer that the only purpose of the picketing was informational, and denied that they sought any breach of an existing contract.

A discovery deposition was taken from one C. Earle Williams, the present president of the Chattanooga Building Trades Council, and the person who was responsible

fendants decided to take action and placed a picket on the job who bore a sign stating:

> "Rea Construction Company not under contract with Chattanooga Building Trades Council, AFL."

The picketing had the effect of shutting down the job.

An injunction was sought on the ground that the picketing appeared to be for the purpose of obtaining a breach of contract, which would be illegal under state law.

A preliminary injunction issued, and thereupon the defendants filed an answer asserting, among other things, that the state court had no jurisdiction since the sole jurisdiction lay with the National Labor Relations Board.

The defendant labor organizations asserted in their answer that the only purpose of the picketing was informational, and denied that they sought any breach of an existing contract.

A discovery deposition was taken from one C. Earle Williams, the present president of the Chattanooga Building Trades Council, and the person who was responsible for placing the picket.

He asserted that the labor organizations were not

interested in trying to get a contract and was asked the following questions and gave the answers appearing thereto:

"Q Was there any labor dispute of any kind in existence at that time between the Chattanooga Building Trades Council on the one hand or the unions connected with it and Jafco and Rea Construction Company, was there any labor dispute in existence between them?

"A Directly, I guess not. I mean, I don't know of any particular item.

"Q In other words, you had not been to them, the unions had not been to them to discuss any matters or ask them anything at all?

"A Well, I couldn't say that the unions hadn't been. I have never talked to anybody either with Rea or with Jafco.

"Q So far as you know, no union representative had ever talked to them about having contracts on this job?

"A I don't know of it.

"Q So far as you know, then, the Chattanooga Building Trades Council had never sought from these parties a contract, is that right?

"A That's correct."

Yet the language on the sign carried by the picket clearly indicates that the union was directing the public's attention primarily to the fact that the employer was not under contract!

The union has gotten itself caught between the

having no labor dispute at all, and, veering toward the latter, have run their case aground.

* * * * *

It is elementary that the word "controversy" means a dispute arising between two or more persons.

But there was no dispute here.

There was no effort made to obtain a contract and no purpose of trying to obtain a contract.

This being so, it cannot be argued by the unions that the case should have gone before the National Labor Relations Board instead of being tried by the state court.

This court and other courts have repeatedly recognized in recent years that Congress did not intend that every piece of litigation involving a labor organization would necessarily be pre-empted by the National Labor Relations Board.

Mr. Justice Frankfurter in the Garmon case quoted from the Anheuser-Busch case as follows:

> "State jurisdiction has prevailed in these situations because the compelling state interest in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction."

And as recently as December 10, 1962, this court

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> "State jurisdiction has prevailed in these situations because the compelling state interest in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction."

And as recently as December 10, 1962, this court reversed the ruling of lower courts which had held that there could be no jurisdiction of a state court because

of pre-emption doctrine. In the decision in the case of Smith vs. Evening News Assoc., Mr. Justice White stated that

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301."

Other cases which in recent years have held that state court jurisdiction is not pre-empted where there is no labor dispute include the following:

Curry vs. Construction Laborers Union,
49 LRRM 2392
Wilson-Jacobi, Inc. vs. Genuth,
45 LC 59,594
Wooten vs. Ohler,
45 LC 50,557.

There are many more.

* * * *

It is interesting to note that the record indicates that the attorneys for the petitioner labor organizations went to the National Labor Relations Board with this case, seeking to know whether the Board had jurisdiction, and that the Board responded that they were unable to render any opinion on the matter because of the limited facts set forth.

Surely the National Labor Relations Board would

that

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301."

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There are many more.

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It is interesting to note that the record indicates that the attorneys for the petitioner labor organizations went to the National Labor Relations Board with this case, seeking to know whether the Board had jurisdiction, and that the Board responded that they were unable to render any opinion on the matter because of the limited facts set forth.

Surely the National Labor Relations Board would have no jurisdiction over a matter of this sort in which

there is no claim made of an unfair labor practice and no proof whatsoever of a labor dispute.

Had the petitioners desired to create a dispute, it would have been very easy for them to do so.

However, in the absence of a dispute, we submit that the findings by the various lower courts which held that there was no dispute are valid and that the petition should be denied.

* * * *

We also would point out that this case has been moot for approximately a year and a half now.

Counsel for the petitioners represented to the Court of Appeals of Tennessee in the summer of 1961 that unless a decision were given within the next few weeks, the whole matter would be over and moot and there would be no further point in pursuing the case. (We do not know their exact language, but simply the general meaning thereof.)

In the light of the tremendous load of cases that is thrust upon this Court, it would seem undesirable to assume one in which

(a) The litigation between the parties has been rendered moot, and

(b) It is so clearly obvious that a correct conclusion was reached by the state courts.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. [redacted] 43

N. L. LINER et al.,
Petitioners,

vs.

JAFCO, INC., et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals
of Tennessee, Eastern Section.

BRIEF FOR PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 628.

N. L. LINER et al.,
Petitioners,
vs.
JAFCO, INC., et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals of Tennessee, Eastern Section.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the Court of Appeals of Tennessee, Eastern Section, was rendered on January 12, 1962 (R. 93).

A petition for certiorari to the Supreme Court of Tennessee was denied without opinion by the Supreme Court of Tennessee on September 28, 1962 (R. 107).

JURISDICTION.

The jurisdiction of this Court rests upon 28 U. S. C., Sec. 1257 (3). Petitioners, labor unions and their members, have been enjoined by a state court in Tennessee

which lacks jurisdiction inasmuch as the comprehensive Federal Labor Management Relations Act of 1947 has preempted this field of regulation and closed it to parallel state action.

The denial of certiorari by the Supreme Court of Tennessee made effective the decision of the Court of Appeals of Tennessee as the final judgment rendered by the highest court of Tennessee in which a decision could be had.

QUESTION PRESENTED.

Do the Tennessee Courts have jurisdiction to enjoin peaceful picketing by unions, protesting working conditions or work practices of an employer, when the contention is made by the employer that there is no "labor dispute" or "interstate commerce" involved and state laws prevail, but the evidence shows that the dispute and commerce involved were arguably within the meaning of the Labor Management Relations Act and the commerce involved meets the standards set by the National Labor Relations Board, and the matters in dispute had never been presented to the National Labor Relations Board for determination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is found in the Constitution of the United States, Article VI, second sentence, as follows:

> "This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall

be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

Pertinent statutory provisions which are printed in Appendix A, infra, p. 19 ff., are as follows: Pertinent portions of the Labor Management Relations Act of 1947, viz.: 29 U. S. C., Sec. 152 (7) and (9), 61 Stat. 137; 29 U. S. C., Sec. 157, 61 Stat. 140, 29 U. S. C., Sec. 158 (b) (4), 73 Stat. 525, 542, 545; Tennessee Statutes relating to declaratory judgments, Secs. 23-1102, 23-1103; and Tennessee Statutes relating to breach of contracts, Sec. 47-1706, and right-to-work laws, Secs. 50-208 and 50-209.

STATEMENT.

Petitioners, Chattanooga Building Trades Council, AFL, Local 846 of the Hod-Carriers, Building and Common Laborers Union of America, and its International, Hod-Carriers, Building and Common Laborers Union of America are labor organizations and their individual officers and members affiliated with the AFL-CIO. Respondent, Jafco, Inc., is a company engaged in building a large shopping center within the City of Cleveland, Tennessee. Respondent Rea Construction Company, the prime contractor, is a corporation engaged in general building contractual work in several states. Substantial interstate shipments of materials purchased outside the state of Tennessee were required for this project. Rea Construction Company was a non-retail employer who had an annual inflow and outflow of goods and services from or to persons outside the state several times over the jurisdictional yardstick of $50,000.00 as set by the National Labor Relations Board. The question of interstate commerce is hereinafter discussed on pages 6, 10-13. The complaint alleged that the respondents were building a shopping center to cost in the neighborhood of two million

dollars and when completed there would be many tenants (R. 1-8). Respondents and petitioners became embroiled in a labor dispute by reason of the following facts:

The stockholders of the Rea Construction Company also own, or have substantial interests in another construction company, J. H. Jones Construction Company, and both of these companies have home offices located in Charlotte, North Carolina. Petitioners introduced testimony to show that the respondent, Rea Construction Company, operates under the lowest possible working conditions while its sister-corporation, Jones Construction Company, works under union contracts, pays the prevailing wage scales, and otherwise complies with area working conditions (R. 54-55, 80-82).

It was argued to the Court that the purpose of having two separate companies operating as aforesaid was to circumvent the NLRA by having the Jones Construction Company to work in areas where there was at least some union support and the courts would permit informational picketing of a company like Rea Construction Company. On the other hand, the Rea Construction Company worked in areas wherein it could underbid competitors due to its lower wage scales and working conditions and where the company hoped to obtain a state court injunction against all picketing.

Soon after the construction work began one of the Chattanooga Hod-Carriers' business representatives stopped at the job site and the colored laborers explained the low rate of pay they were receiving and asked their union representative if something could be done (R. 49). The Chattanooga Building Trades had already considered the placing of a picket at the job site (R. 54).

On August 8, 1960, respondent N. L. Liner, a member of the local Hod-Carriers' Union appeared on the scene

of the construction with a picket sign which stated as follows:

> "Rea Construction Company not under contract with Chattanooga Building Trades Council, AFL" (R. 4).

There was no complaint that the picket banner misstated the facts or was misleading. There was no complaint of violence, mass picketing or such. The respondents concluded from mere picketing that the purpose of the picketing was to force a breach of the contracts between the respondents and their subcontractors which would be unlawful under Tennessee laws.

The bill of complaint alleged that petitioners were engaged in unlawful conduct in attempting to cause breaches of contracts which would be unlawful under the Tennessee Code Annotated, Sections 47-1706, 50-208 and 50-209 (R. 1-8). Within a matter of minutes petitioners were stopped from peaceful picketing by an ex parte injunction issued by a state court.

It was the contention of the petitioners that they had the right to establish a single picket to advertise the truth and permit the public in Cleveland and vicinity to know of the dispute. The position of the petitioners was and is that the picketing was protected under Section 7 of the Act, but assuming that respondents' contention was true, the activity was clearly covered by Section 8 (b) (4) (i) (ii) of the Act. In either event a controversy was presented that could be resolved only by the National Labor Relations Board.

SUMMARY OF ARGUMENT.

The Tennessee Court of Appeals in its decision quoted verbatim the decision of the Trial Court in which the following statement was made:

> "Defendants' principal contention involves the question of the Court's jurisdiction. Their able solicitors argued that the National Labor Relations Board has sole and exclusive jurisdiction because interstate commerce is involved here.
>
> "The Court is of opinion and therefore finds that the erection of a shopping center does not involve interstate commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to interstate commerce. But, if it did, there was no labor dispute" (R. 95).

Later in the Opinion it was held that all questions had become moot as the construction project was completed (R. 97).

The points for argument are clearly focused by the above ruling which was rendered on January 12, 1962. The Tennessee Courts in effect held that it was for state courts to decide whether or not there is a "labor dispute" and whether "interstate commerce" is involved. This Court held, on June 11, 1962, in the case of Marine Engineers Beneficial Association v. Interlake Steamship Co. et al., 370 U. S. 173, as follows:

> "The task of determining words defined by the Labor Management Relations Act must in any doubtful cases begin with the National Labor Relations Board whenever a reasonably arguable case is made to that effect."

The action of the Tennessee Courts is in direct conflict with this Court's opinion in the Interlake case. As was

pointed out in the appeal to the Tennessee Court of Appeals (R. 91), the interpretation of the terms within the Labor Management Relations Act arguably should be left to the tribunal which Congress has established to administer the Act.

This court has held that a cause of action is not rendered moot by the completion of a construction project, **Local 74, United Brotherhood of Carpenters v. NLRB, 341 U. S. 707.** If state courts can arbitrarily take jurisdiction of labor cases, hold the cases until the construction project is completed, due to inherent delays in litigation, and then dismiss the case as being moot, the underlying disputes will never be resolved for the reason that on the next construction project one can expect the same result.

In the case of **San Diego Council v. Garman, 359 U. S. 236,** this Court in referring to its previous decisions of Weber and Guss held that to allow the states to control activities which potentially are subject to federal regulation involves too great a danger of conflict with national labor policy.

The Tennessee Courts completely ignored the federal questions and rendered a decision without citing or referring to any Federal laws or controlling decisions. The ruling by the State Court is such as to defeat the plain legislative intent of Congress.

ARGUMENT.

I.

Words defined by the Labor Management Relations Act must, in a doubtful case, begin with the National Labor Relations Board.

Labor Dispute.

The term "labor dispute" is defined by Section 2 (9) of the National Labor Relations Act as follows:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer or employee."
>
> 29 U. S. C., Sec. 152.

In the case of **American Federation of Labor v. Swing, 312 U. S. 321**, it was expressly held that a requirement that there be an employer-employee relationship would be unconstitutional. The Tennessee Supreme Court followed the Swing case in **Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801.** In the Watson case the Tennessee Supreme Court held that a Union could peacefully picket a place of business where it had no members at all and did not seek or hope to have any.

The facts in the present case as to the type of labor dispute are almost identical with those in the case of **Local No. 438, Construction and General Laborers Union, AFL-CIO v. S. J. Curry, decided January 21, 1963, ... U. S. ...; 83 S. Ct. 531.**

More recent decisions of sister states were cited to the Tennessee courts at each stage of the hearings. The Texas case of **Ex parte Dilley, 334 S. W. 2d 425**, is almost identical to the present labor dispute. In that case there was picketing at a construction site to protest working conditions. The Supreme Court of Texas did not hesitate to say that the dispute was arguably for the National Labor Relations Board. The Washington case of **Freeman v. Retail Clerks Union, 363 Pac. 2d 803**, decided July 20, 1961, was also cited to the Court wherein the Supreme Court of Washington stated there was no labor dispute between the employer and its employees, that the pickets were not employees and that the union had no contractual relationship with the employees, actual or potential. The Washington court held that the matters were arguably for the National Labor Relations Board as the picketing was subject to Sections 7 or 8 of the Labor Management Relations Act. The South Carolina Supreme Court decision, in the case of **Piedmont Shirt Company v. Amalgamated Clothing Workers, 115 S. E. 2d 499**, was also cited as another case wherein there was no employer-employee relationship, actual or potential.

The only conclusion that can be drawn from the decision of the Tennessee Court of Appeals is that there must be an employer-employee relationship, or at least representatives of the union must discuss the matter with the employer before picketing would be permissible. Petitioners well remember the case of **Howard v. Haven, 198 Tenn. 572, 281 S. W. 2d 480**, originating under the same trial judge. In that case there was a conversation between a union business representative and an employer, and based upon that conversation the trial court held that the purpose of the picketing that followed was to cause a breach of contract and the non-union contractor who was dismissed from the job was entitled to treble damages under state law. The plight of the petitioners now under

Tennessee law is that if a union merely discusses a controversy with an employer and someone is discharged, the union will be subjected to a damage suit for treble damages. In the event there is no conversation an injunction will issue prohibiting picketing because there is no labor dispute.

It was argued to the Tennessee Court of Appeals that the facts presented a labor dispute concerning terms or conditions of employment in that respondents do not recognize or have union contracts. In the Brief filed with the Court of Appeals it was stated:

> "It is respectfully submitted that the interpretation of this term arguably should be left to the tribunal which Congress has left to administer the Act" (R. 91).

The action of the Tennessee Courts is in direct conflict with this Court's opinion rendered thereafter in the case of **Marine Engineers Beneficial Association v. Interlake Steamship Company et al.**, 370 U. S. 173, wherein this Court specifically held that the task of determining words defined by the Act must, in any doubtful case, begin with the National Labor Relations Board whenever a reasonably arguable case is made to that effect.

Commerce.

The term "affecting commerce" is defined by Section 2 (7) of the National Labor Relations Act as follows:

> (7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. 29 U. S. C., Sec. 152.

It is also submitted that the question of "affecting commerce" should be left to the National Labor Relations Board when a reasonably arguable case is made to that effect.

This Court held in **Labor Board v. Faiblatt, 308 U. S. 601**, that the power of Congress to regulate interstate commerce is plenary and extends to all commerce be it great or small. The Faiblatt case was followed by the case of **NLRB v. Denver Building Trades Council, 341 U. S. 675.** In 1957 the cases of **Amalgamated Meatcutters v. Fairlawn, Inc., 353 U. S. 20**, and **Gus v. Utah Labor Relations Board, 353 U. S. 23**, were acted upon by this Court. This Court again made it clear that Congress had pre-empted the jurisdiction into the National Labor Relations Board, and it was up to Congress to make any changes. In 1959 the United States Congress acted and in November, 1959, the new law went into effect. Under **Section 701 of the Landrum-Griffith Act, 29 U. S. C. 164**, the Board was authorized to decline to assert jurisdiction where, in the opinion of the Board, the effect on commerce was not substantial. It was specifically provided that the Board was not able to decline jurisdiction over any labor dispute which it would have asserted jurisdiction under the standards prevailing on August 1, 1959.

Considering the possibility that the Trial Court might fail to take judicial cognizance of the Board's yardstick, counsel for petitioners wrote the National Labor Relations Board, Tenth Region, at Atlanta, Georgia, for an advisory opinion (R. 68) and received a reply (R. 70) which outlined the Board's jurisdictional standards.

The Board's jurisdictional standards require a showing that a non-retail employer has annual inflow and outflow of goods and services from or to persons outside the State amounting to $50,000.00. See **Siemon's Mailing Service,**

122 NLRB No. 13, and the case of **Lennox-Haldman Co., 127 NLRB No. 49.** The Board will consider not only the operations of the primary employer, but all of the operations of subcontractors or secondary employers involved. See **McAllester Transfer, Inc., 110 NLRB No. 224; Reilly Cartage Co., 110 NLRB No. 233,** and **Carpenters, etc., 111 NLRB 1025.**

The complaint as amended does not state whether respondents are engaged in intrastate or interstate commerce. The proof shows conclusively that the complainant, Rea Construction Company, is engaged in **interstate** commerce.

The principal witness of the aforesaid respondent was Fritz Diehl, who is in charge of the Rea Construction Company at Cleveland, Tennessee. Mr. Diehl testified that since the job in question started in July, 1960, the Rea Construction Company had spent about one million dollars of which one-half was for materials (R. 26). Diehl's testimony was given on February 22, 1961 (R. 19). Diehl further estimated about seventy-five percent of the materials were purchased within the state and twenty-five percent outside the state (R. 35). On cross-examination Mr. Diehl was requested to check his figures with his Tennessee office as well as the principal office in North Carolina and file an accurate statement as to the materials purchased outside the state. This was done and filed as Exhibits 1 and 2 to the testimony of Fritz Diehl. Item 1 (c) shows that materials bought from sources outside of Tennessee to be $147,099.67 (R. 43). Accordingly, it is unnecessary to consider the other purchases at the involved projects of Rea Construction Company in North Carolina, Tennessee and Georgia. The NLRB had set its yardstick for commerce flowing into or out from a non-retail employer at $50,000.00 prior to 1959, and Congress, in the Landrum-Griffith Act, froze the yardstick at this point.

By the above yardstick a subcontractor, Lonas Construction Company, working at the time of the dispute, was also engaged in interstate commerce, and had been for two previous years. See testimony of Donald R. Gaither (R. 72-80), wherein he itemized purchases from a company totaling over $50,000.00 a year. The stipulation as to latter company which sold the machines shows that they were purchased from out of the state (R. 71-72).

Solicitors for petitioners were somewhat shocked when the Trial Court and Court of Appeals made no reference to the above facts and controlling cases, and merely stated in the written opinions that only intrastate commerce was involved. The record affirmatively shows that interstate commerce was involved.

II.

Question of Mootness.

A case is not moot because a project which precipitated a strike has been completed when a reasonably arguable case is made to the effect that the matters in controversy should be resolved by the National Labor Relations Board.

The question of mootness was not before the Honorable Tennessee Court of Appeals, yet it fortified its opinion by holding that all questions were moot. The court then proceeded to render a declaratory judgment and adopted the opinion of the Trial Court. Petitioners, in an earlier attempt to advance the case on the trial docket of the Court of Appeals had filed a motion stating that by the terms of the contracts respondents had with various construction companies the work was to be completed as of August 1, 1961. Petitioners' Motion for Advancement set forth the following:

> "The plight and predicament of appellants is very serious. All of the thousands of members covered by the Chattanooga Building Trades are engaged in the

construction business. If they have a grievance which they wish to publicize they have a limited time to do so—only during the course of construction. Most projects require a year or less for completion. If the Trial Court takes a position which the appellants consider arbitrary or contrary to law they have no means to have the decision of the lower court reviewed. It is respectfully submitted that the employer complainant will delay the case with every legal means once a temporary injunction has been obtained. Once the construction project is over and the case becomes moot the employer will dismiss its bill and pay the costs rather than risk an appellate decision. Thus, the employer is in the enviable position in the field of labor-management of having the Trial Court to settle labor disputes by injunctive process." (original record 289-295).

The Court of Appeals refused to advance the case for hearing, and this cause came on to be heard for final argument on September 7, 1961. At that time the Court of Appeals made inquiry as to the construction completion date and both petitioners and respondents agreed that the construction would continue for several weeks due to various construction delays. This fact is set forth in the sworn petition to the Tennessee Supreme Court (R. 101-102). The Court of Appeals proceeded to hear argument, accept briefs and no further evidence was submitted on the question. The Court of Appeals held the case for judicial determination until January 12, 1962 (R. 93).

If the case became moot it did so only because the Tennessee State courts arbitrarily and illegally took jurisdiction. The case is not moot for the following reasons:

This Court has held, in the enforcement of National Labor Relations Board orders, that questions are not moot

based upon the possibility of a recurrence, **NLRB v. Penna. Greyhound Lines, 303 U. S. 261.** This matter is arguably before the National Labor Relations Board. It is the desire of the petitioners to picket the respondents in the future under the same conditions, and unless relief is granted by this Honorable Court this will not be permitted under the law as interpreted by the Tennessee courts.

The Tennessee courts have the right to make advisory or declaratory judgments by Sections 23-1102 and 23-1103 of the Tennessee Code Annotated, Appendix A. The Court of Appeals for the Eastern District of Tennessee made such an advisory opinion, and it is respectfully submitted that respondents are estopped from raising a question of mootness. If a court makes an advisory opinion, then it logically follows that a higher court has the authority to review that advisory opinion.

This case is similar to the case of **Plumbers v. County of Door, 359 U. S. 354,** wherein the question of mootness was raised on oral argument before this Court but does not appear in the decision. A memorandum was submitted in that case, arguing that a case is not moot where, as here, (1) the injunction prohibits the petitioners from picketing at the location should the respondent contractor or any non-union employer be engaged to perform, repair or do maintenance work, (2) the underlying disputes between the petitioners and respondents have not been resolved, and (3) the petitioners' right under the state law to recover damages and court costs incurred in the course of resisting the issuance of the injunction is dependent upon the holding by this Court that the judgment below is erroneous.

Counsel for the labor unions involved herein, by coincident, was counsel for the unions in what was perhaps the first case under the Labor Management Relations Act of 1947; **Local 74, United Brotherhood of Carpenters and**

Joiners of America et al., and Ira A. Watson Co., Case No. 10-CC-1. In that case the picketing of which complaint was made ceased on the day before the 1947 amendments became effective. The facts presented by that case eventually reached this court through an appeal from the Sixth Circuit which had affirmed the order of the National Labor Relations Board. See Local 74, United Brotherhood of Carpenters v. NLRB, 341 U. S. 707, 715. This Court held as follows:

> "This case has not been rendered moot by the completion of the renovation project. * * * The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited. The underlying dispute between petitioners and Watson's has not been shown to have been resolved."

The same picketing in the above case also precipitated action in the state court which eventually was resolved by the Supreme Court of Tennessee. See **Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801.** The action of the State Court has been previously discussed herein under "Labor Dispute", at page 8.

The granting of a temporary injunction in the present case was conditioned by the granting of an injunction bond. The bond is still in full force and effect. Under Tennessee law a defendant, in a proceeding for a temporary injunction, is entitled to recover damages and costs upon an injunction bond in the event it is ultimately determined that an injunction was erroneously issued. Unless the Court rules on the question presented herein, petitioners will be precluded from raising the question upon remand to the state courts.

Where, as here, a timely claim of federal preemption is made in a state court injunction proceeding, the cause

should be presumed justiciable in the absence of a clear and convincing showing that the matter has become moot. Every building project is necessarily completed at some definite point in time. Inherent delays in litigating cases through state courts makes it impossible to bring the case to this Court as a practical matter until most buildings have been completed. E. G. **Local 74, United Brotherhood of Carpenters v. NLRB, 341 U. S. 707, 715.**

In the final analysis the action of the state court is in direct conflict with this court's decision in the case of **San Diego Council v. Garman, 359 U. S. 236,** wherein it was held that the governing consideration is that to allow the states to control activities that are potentially subject to federal regulations involves too great a danger of conflict with national labor policies.

Preemption.

The decision by the Tennessee Court of Appeals is similar to those decisions of the Tennessee Appellate Courts in the cases of **Kerrigan Iron Works v. Cook Truck Lines, 41 Tenn. App. 467, 296 S. W. 2d 379,** and **Farnsworth & Chambers v. Local Union 429, Electrical Workers, 201 Tenn. 329, 299 S. W. 2d 8,** which this Court reversed on May 27, 1957, **353 U. S. 968, 969.** The controlling cases of **San Diego Council v. Garman, 359 U. S. 236,** and **Marine Engineers Beneficial Association v. Interlake Steamship Company, 370 U. S. 173,** were not referred to by the Tennessee Courts.

The Court of Appeals for the Eastern Section has very strong views of its own in labor-management questions, perhaps best illustrated by the concurring opinion in the case of **Volunteer Electric Corp. v. Gann,** decided September 8, 1960, not reported in the official reports but reported at **46 LRRM 3049.**

It is submitted that unless the present decision is reversed the checker-board system which this Court condemned in the case of **Garner v. Teamsters, 346 U. S. 485,** will be given new life. Prior to the present decision most of our state trial courts recognized the doctrine of preemption.

Under the present decision which is binding on every court in the State of Tennessee the doctrine of preemption no longer exists. Labor-management disputes are left to the whims of trial judges in resolving industrial disputes.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court below, the Court of Appeals of Tennessee, Eastern Section, should be reversed.

.....

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APPENDIX A.

Pertinent Statutory Provisions.

29 U. S. C., Sec. 152. **Definitions.**

When used in this subchapter—

"• • •

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

• • •

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer or employee."

29 U. S. C., Sec. 157. **Right of Employees as to Organization, Collective Bargaining, Etc.**

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

29 U. S. C., Sec. 158 (b) (4).

"(b) It shall be unfair labor practice for a labor organization or its agents—

* * *

(4) (i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if

another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;"

Tennessee Code Annotated, Section 23-1102. General Power of Courts.

"Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree."

Tennessee Code Annotated, Section 23-1103. Construction of statutes and written instruments.

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Tennessee Code Annotated, Section 47-1706. Procurement of breach of contracts unlawful—Treble damages.

> "It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of said contract; and the party injured by such breach may bring his suit for said breach and for such damages."

Tennessee Code Annotated, Section 50-208. Denial of employment because of affiliation or nonaffiliation with labor union unlawful.

> "It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

Tennessee Code Annotated, Section 50-209. Contracting for exclusion from employment because of affiliation or nonaffiliation with labor union unlawful.

> "It shall be unlawful for any person, firm, corporation or association of any kind to enter into any contract, combination or agreement, written or oral, providing for exclusion from employment of any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

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In the Supreme Court of the United States

No. [redacted] 43

OCTOBER TERM, 1962.

N. L. LINER, *et al.*,
Petitioners,

vs.

JAFCO, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENTS.

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In the Supreme Court of the United States

No. 628.

OCTOBER TERM, 1962.

N. L. LINER, *et al.*,

Petitioners,

vs.

JAFCO, INC., *et al.*,

Respondents.

BRIEF OF RESPONDENTS.

QUESTION PRESENTED.

Do the Tennessee courts have jurisdiction to enjoin peaceful picketing, intended to produce a breach of contracts among employers picketed, when no arguable labor dispute is involved as a matter of fact?

STATEMENT OF THE CASE.

Jafco, a Tennessee corporation having its office and only place of business in Cleveland, Bradley County, Tennessee, contracted with Rea Construction Company, a foreign corporation licensed to do business in Tennessee, for the construction of a shopping center in Cleveland. During the construction period, on August 8, 1960, N. L. Liner, a member of Local 846 of the Hod Carriers Union, appeared at the construction site bearing a sign reading "Rea Construction Co. not under contract with Chattanooga Building Trades Council, A. F. of L." This caused certain union employees who were on the job to leave their jobs, and shut down the progress of the work.

A bill in Chancery was filed by Jafco, with Rea later added, to enjoin the picketing because it was done for the purpose of inducing a breach of contract, in violation of Tennessee law. (R. 1 *et seq.*) At the hearing the testimony of the Union showed clearly that the picketing was *not* for the purpose of organizing the employees of Jafco or Rea. The trial court found that the real purpose of the picketing was to cause the breach of contracts valid under Tennessee law. The trial court also found, as a matter of fact, that interstate commerce was not involved (R. 84 *et seq.*), and that there was no "labor dispute." (R. 17 and 86.)

On or about August 1, 1961, the construction job was completed. In January of 1962 the Court of Appeals affirmed the trial court. They concurred in the finding by the trial court that no labor dispute existed, and that the defendants never attempted to organize the Rea Construction Company. In addition, they noted the mootness of the question since construction had long since ceased. (R. 97.)

The defendants did not, during the pendency of this case, apply to the National Labor Relations Board for relief. (R. 87.) They did, through their attorney, make inquiry as to whether the Board would assert jurisdiction, but received only a non-committal reply. (R. 68-70.)

SUMMARY OF ARGUMENT.

The respondents contend that there was no arguable labor dispute in this case and, even if there were, the case is moot.

ARGUMENT.

I.

NO ARGUABLE LABOR DISPUTE EXISTED.

The Chancellor held that the purpose of the picketing was "to shut down this project and cause the breach of contracts." (R. 87.) The Court of Appeals agreed with the Chancellor that "a bona fide labor dispute did not exist." (R. 98, 17.) Petitioners never at any time sought to obtain a contract from Rea or Jafco, and the picketing was admittedly not for the purpose of obtaining a contract. (R. 58, 59 and 60.) No labor dispute was ever claimed to exist—the contentions of the petitioner are that it has a right to picket (as "free speech") regardless of the effect or purpose. The closest parallel is the right to yell "Fire" in a crowded theater. If a person wanted to damage the theater owner, lit a small fire, and yelled "Fire," he would be acting similarly to the petitioner here. They attempted to create a "labor dispute" that was beyond solution (see bottom of page 58, in the Record), with the clear object of destroying contractual relations between Jafco and others, but the facts did not fit the statutory definition.

Marine Engineers Beneficial Association vs. Interlake S. S. Co. et al., 370 U. S. 173, concerned the interpretation of the term "labor organization." The Supreme Court held that the term, being within the National Labor Relations Act's scope, must be interpreted by the National Labor Relations Board. No interpretation of the Act is involved here.

Local No. 438, Construction & General Laborers Union, AFL-CIO vs. S. J. Curry, 371 U. S. 542, is much closer to the present case. In the Curry case the Union attempted to negotiate with Curry, and the Union also attempted to negotiate with the city of Atlanta (the equivalent of Jafco here) before picketing. The Georgia Superior Court denied an injunction. Despite this, and with facts in the record to support the labor dispute (over wages) the Georgia Supreme Court reversed. Clearly there was an arguable labor dispute in that case.

In the case now before the Court there were no negotiations with anyone, and none were desired. No contract was sought. The sole purpose of the picketing, as found by the lower courts on ample evidence, was to force a breach of construction contracts. This does not produce any arguable labor dispute.

II.

THIS CASE IS MOOT.

There is no question but that the construction project has long since been completed. The petitioners try to get around that by discussing damages for wrongful issuance of an injunction, and by placing the blame on the Tennessee courts for the delay. But why did the petitioners not go to the National Labor Relations Board themselves? They considered it (R. 68, 70). The Board declined their request for an informal opinion, and they apparently made no further attempt to get the Board to act. As expressed by the Chancellor:

> "* * * it will be observed that defendants have been free at all times to apply to the National Labor Relations Board for relief had they thought this Board had jurisdiction. Their failure to seek such relief leaves but one obvious conclusion, that the Board was without jurisdiction."

The petitioners speak of estoppel in their brief (p. 15). The term might be more aptly applied to their own actions in failing to go to the National Labor Relations Board.

CONCLUSION.

To hold that whenever a party insists that an arguable labor dispute exists the state court has no jurisdiction is to relegate many serious problems in the administration of justice to a limbo where no remedy at all is available. A party to a lawsuit does not decide whether he has stated a case—the court decides that.

The state court action should be affirmed.

Respectfully submitted,

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